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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1172.

DANIEL STURR, APPELLANT,

vs.

CHARLES W. BECK.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

FILED JULY 8, 1889.

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1 In the Supreme Court of Dakota Territory. October Term, 1887.

DANIEL STURR, Appellant,
vs.
CHARLES W. BECK, Respondent.

Appeal from Lawrence county.

Transcript.

McLaughlin & Steele, attorneys for appellant.

2 TERRITORY OF DAKOTA, *First Judicial District,* } *ss:*

In the District Court in and for Lawrence County.

DANIEL STURR, Plaintiff,
vs.
CHARLES W. BECK, Defendant.

The Territory of Dakota sends greeting to Charles W. Beck, defendant:

You are hereby summoned and required to answer the complaint of the above-named plaintiff, a copy of which is herewith served upon you, and to serve a copy of your answer upon the subscriber at — office, in ——; within thirty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer this complaint within that time the plaintiff will take judgment against you for the relief demanded in the complaint, besides the costs of this action.

Dated at Deadwood, D. T., this 29th day of June, A. D. 1887.

McLAUGHLIN & STEELE,
Plaintiff's Attorneys.

(Endorsed:) Summons. Money demand. For relief. Complaint served. Territory of Dakota, Lawrence county. In district court. Daniel Sturr *vs.* Charles W. Beck. McLaughlin & Steele, plaintiff's attorneys.

3 TERRITORY OF DAKOTA, *County of Lawrence,* } *ss:*

In District Court, First Judicial District.

DANIEL STURR, Plaintiff,
against
CHARLES W. BECK, Defendant.

Complaint.

The plaintiff above named complains of the defendant, and for cause of complaint alleges—

1. That the plaintiff is now and has been for ten years last past the owner and in the possession of the west one-half (W. ½) of the southeast quarter (S. E. ¼) and the east one-half (E. ½) of the southwest quarter (S. W. ¼) and the southeast quarter of the northwest quarter (S. E. ¼ of N. W. ¼) of section thirty-five (35), in township seven (7) north, range three (3) east, of the Black Hills meridian, in this county, and has lived upon and improved the same; that said tract embraces two hundred acres and is enclosed with a fence, partly board fence and partly wire, and that plaintiff has now about seventy acres of land within this enclosure under cultivation and sowed to wheat, oats, hay, and vegetables.

2. That on or about the 15th day of May, A. D. 1880, while living upon said premises and cultivating a good part of the same, he located a water right on False Bottom creek, about one-half mile south of said premises, at or near the south line of lot No. 2, in section 2, township 6 north, range 3 east, of the sixth principal
4 meridian of the Black Hills, in this county, on a homestead claim of one John Smith, claiming 500 miners' inches of the waters of said creek for mining, milling, agricultural, and domestic purposes; that at the same time he constructed a water ditch from a point about ten rods south of said south line of lot No. 2, in section 2, in a northerly direction across said lot 2 and across the township road running between plaintiff's premises and the premises of said John Smith, and turned, diverted, and appropriated upward of three hundred inches of the water of said creek into and through said ditch each year thereafter, to be used and which was used for the purpose of watering or irrigating plaintiff's crops upon his said ranch or premises until the happening of the grievances hereinafter complained of.

3. That immediately after making the location of said water right, as above stated, plaintiff with due diligence constructed his said ditch, and in the early summer of that year commenced to flow and used the waters of said False Bottom creek upon his premises for irrigating his crops sowed and planted thereon, and thus his right by priority of possession to use the waters of said creek by means of the ditch aforesaid upon his said ranch had vested and accrued to him for the purpose of irrigating his crops, and also the right of way for his ditch from the point of diversion on the said homestead of John Smith northwardly across lot No. 2, in section 2, in said township No. 6, and the right to use said water and the right of way for the ditch to carry said water as aforesaid was and is now recognized and acknowledged by the local customs, laws, and decisions of
5 the courts, and this plaintiff is the possessor and owner of such vested rights.

4. That the defendant became the owner by purchase, in the spring of 1884, of the said John Smith homestead, subject to plaintiff's water right and right of way aforesaid; but not respecting plaintiff's rights in that regard, but disregarding them, did, on or about the first day of June, 1886, obstruct plaintiff's said ditch at a point on said lot 2 and prevented the flow of water through the same and diverted and used the water therefrom upon defendant's own land in irrigating

his own crops; that in consequence of this unlawful diversion of the water from plaintiff's said ditch he was without water during the growing and ripening part of the season last year, and his crops were injured in consequence, to the great damage of this plaintiff in the sum of two thousand dollars.

5. That said defendant has and is now wrongfully obstructing the flow of water from said creek through said ditch of plaintiff at or near the same place on said lot No. 2 and diverting and using it from said ditch in irrigating his own crops on said lot and preventing any of the water from flowing through said ditch upon the premises of this plaintiff, and is continuing to so divert it and threatens to continue to divert it and prevent this plaintiff from using his said ditch and water right unless restrained by the order of this court from further interference therewith; that plaintiff has sowed in wheat, oats, and hay and planted in various kinds of vegetables about seventy acres of land on his ranch, now in a very promising condition, and which will be worth to him many thousands of dollars if he can have the free and undisturbed use of his
6 ditch and water right aforesaid during the remaining days in June, July, and August of this year, as he of right should have; otherwise his crops will be failures, and he will be damaged by the wrongful acts of said defendant as aforesaid many thousand dollars.

Wherefore plaintiff prays that a temporary order of injunction issue to said defendants, his agents and servants, and to all persons acting in aid or assistance to him, directing and commanding him and they [them] from all manner of interference with said plaintiff's water right and ditch and the use of the water of False Bottom creek through the same, and from interfering with the right of way of plaintiff's said ditch in any manner or in preventing the same from being cleaned out and repaired when plaintiff may desire to do so for the purpose of flowing the water of said creek upon his said ranch; that on the trial of this action said temporary injunction may be made perpetual; that plaintiff recover from the defendant two thousand dollars, his damages sustained, with costs, and for such other and further relief as to the court shall seem meet.

McLAUGHLIN & STEELE,
Attorneys for Plaintiff.

7 TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

Daniel Sturr, of lawful age, being first duly sworn, deposes and says: I am the plaintiff in the foregoing-entitled action; I have heard the complaint read, know its contents, and know the same to be true of my own knowledge except as to matters therein stated on information and belief, and as to those matters I believe it to be true.

DANIEL STURR.

Subscribed and sworn to before me this 28th day of June, A. D. 1887.

[SEAL.] ROBERT C. HAYES,
Notary Public.

(Endorsement:) In district court. Daniel Sturr *vs.* Chas. Beck. Summons and complaint. McLaughlin & Steele, att'ys for pl'ff. Filed July 19th, 1887. W. H. Jones, clerk, by A. A. Raymond, deputy.

8 In the District Court of the First Judicial District of the Territory of Dakota in and for Lawrence County.

DANIEL STURR
vs.
CHARLES W. BECK.

Now comes the defendant and, answering the complaint of the plaintiff herein, says:

1st. He denies each and every allegation in the second and third paragraphs contained inconsistent with the statements and allegations of this answer, and alleges the facts in regard to the matters and things attempted to be pleaded in said second and third paragraphs of said complaint to be as follows, to wit: That on or about 15th day of May, 1880, the plaintiff, without right or any color of right, went upon the premises of one John Smith, described in said complaint, then occupied by the said Smith as a homestead and held by him under and by virtue of a homestead entry thereof, at the United States land office at Deadwood, D. T., on the 25th day of March, 1879, and thereupon the said plaintiff, without permission or consent of the said Smith, but against his protest and objection and by means of intimidation and threats and taking undue advantage of the said Smith's ignorance of the law and his rights in the premises, dug a ditch on the premises aforesaid and by means thereof diverted the waters of said False Bottom at a point on said creek, as in said complaint alleged, from the channel of said creek wherein they had been accustomed to flow and would naturally flow
9 except for such diversion, and thereafter carried a portion of the waters of said creek by means of his said ditch onto his land described in paragraph one of the complaint, and there used the same for watering and irrigating his crops during the years succeeding 1880, when the same was beneficial therefor, by reason of insufficient rain-fall; but that such taking, carrying, and using of said waters by said plaintiff through each and every of said years 1880 and following was without the consent of said John Smith and against his protest and objection and obtained by means of the intimidation, threats, and undue advantages aforesaid.

2nd. He alleges that on or about the 26th day of February, 1883, the said John Smith made final homestead entry of his said homestead claim, referred to in said complaint and hereinafter more fully described, and thereby became the owner in fee simple of the same, and thereafter, on or about the first day of May, 1884, sold and conveyed the said premises, by warranty deed, to this defendant and put him into the possession thereof, but denies that this defendant purchased said land and premises of said John Smith subject to a water right or right of way of plaintiff of any kind, character, or

description whatsoever, and alleges the facts to be that his said purchase was of a title in fee simple absolute, without any reservation, qualification, burden, or easement for the benefit of plaintiff or any other person whomsoever, and that ever since this defendant's said purchase he has objected to and interfered with the use by the plaintiff, through and by means of the said ditch, of the waters of said False Bottom creek, and has prevented so far as possible
10 the flow of water from said creek through said ditch and with the flow of any water therein to the plaintiff except surface water or surplus at times of rain; and this defendant admits that he has used the water of said False Bottom creek upon his own premises in irrigating his own crops, as he had good right to do, and denies each and every allegation in paragraph four of plaintiff's complaint inconsistent with the statements contained in this answer.

3d. As to the allegation in paragraph five, this defendant says he admits that he has heretofore, at all times, until enjoined, since his purchase from said John Smith of the premises herein described, obstructed the flow of water from the False Bottom creek through said ditch claimed by plaintiff upon this defendant's land, and has diverted said water from said ditch as far as the same flowed therein, and used the same in irrigating defendant's own crops on his said premises, as he had good right to do, and he admits he has prevented and was preventing up to the time of the service of the order of injunction in this action the water of said False Bottom creek from flowing through said ditch upon the premises of the plaintiff, and was intending to continue the diversion of said water from said ditch and the use thereof upon his own land in irrigating and cultivating his own crops at the time of the bringing of this action by plaintiff, and that as to each and every other allegation in paragraph five of plaintiff's complaint defendant denies that he has any knowledge or information sufficient to form a belief.

4th. By way of further answer and defense for a counter-claim this defendant alleges that on or about the 25th day of March,
11 1887, one John Smith, being a naturalized citizen of the United States, settled upon and occupied as agricultural land that certain portion of the public domain hereinafter described, and thereafter, on the 25th day of March, 1879, applied at the local land office at Deadwood, D. T., and made his homestead entry of the land and premises so settled upon and occupied by him and described as follows, to wit: The west half of the southeast quarter, the southwest quarter of the northeast quarter, and lot two, all in section two, in township six north, of range three E., B. H. M.; that at the time of said Smith's settlement and location upon said land and at the time of his homestead entry thereof the waters of a certain creek or natural water-course called False Bottom creek were flowing in a definite stream formed by nature over, upon, and through the said land, and the same have ever since so continued to flow, except as diverted and disturbed by the wrongful and unauthorized acts of the plaintiff, hereinafter specified, and that until such wrongful and unauthorized acts of the plaintiff no claim of interest in said waters, so long as they flowed upon and through said land, or the right to divert the

same from said creek was asserted by any person except the owner and occupant of said land, to wit, John Smith, who, by virtue of such ownership and possession, was the owner of the waters of said creek so flowing thereon and entitled to the use and enjoyment thereof; that on or about the 15th day of May, 1880, the plaintiff, Daniel Sturr, wrongfully and unlawfully entered upon the said lands and premises of the said John Smith, and, without license or permission from him and against his protest and objection and by means of intimidation and threats and taking undue
12 advantage of said Smith's ignorance of the law and his rights in the premises, dug a ditch on the said land at a point on said False Bottom creek and extending thence across said defendant's land to plaintiff's own land, and by means thereof diverted the waters of said creek and carried the same to and upon his said land, and there used the same, during said year of 1880 and following years, whenever the same suited his pleasure, thereby depriving the said Smith of the natural use and enjoyment of said water in the channel upon his land, where it was accustomed to flow, but that such diversion, carriage, and use of water by plaintiff was at all times against the wish and will of the said John Smith and secured by means of intimidation, threats, and undue advantage aforesaid; that thereafter, on the 26th day of May, 1884, the said John Smith made final entry of his said homestead claim hereinbefore described at the United States land office, and thereafter a patent of the United States was duly issued and delivered to him therefor; that on or about the first day of May, 1884, this defendant purchased the said lands and premises of the said John Smith, and the said John Smith conveyed the same to this defendant by deed, with full covenants, and put this defendant in possession thereof, and he now is and ever since has been in the possession of the same; that this defendant took his said title and possession without any reservation in plaintiff's favor of the right of way for a ditch over said land or the right to divert any of the waters of False Bottom creek or to carry them in said ditch, but with notice from said John Smith that any claim made by the plaintiff of such right of way for said ditch or
13 the right to divert the waters of said creek and carry them through said ditch was without any foundation or shadow of right whatever; that since the purchase of said land as aforesaid by this defendant the said plaintiff has at sundry times wrongfully and unlawfully entered upon this defendant's land aforesaid and attempted to divert the waters of said False Bottom and carry them through the said ditch from and off defendant's land to and upon the plaintiff's land, to this defendant's damage; that this defendant has been and is using his said land as a farm and vegetable garden, and the waters of said creek flowing upon and through said land are necessary and beneficial to the growth and maturing of his said crops, but that plaintiff threatens to invade this defendant's premises and has invaded the same with force of men and taken and carried the water of said creek, through said ditch, away from this defendant and deprived him of the use and enjoyment thereof, to his damage in the sum of one thousand dollars; and, if the plaintiff is

permitted to continue such invasion of defendant's premises and such diversion of said water, this defendant's farms will be rendered of little value and defendant greatly and irreparably damaged.

Wherefore defendant prays that plaintiff take nothing by this action.

2nd. That plaintiff be enjoined and restrained from further invading or trespassing upon this defendant's land and from diverting the water of said False Bottom creek or any part thereof from the channel thereof on defendant's land, and from keeping and maintaining a ditch upon defendant's land, and from in any manner interfering with this defendant's free use and enjoyment of the waters of
14 said creek flowing upon said land, or from asserting any claim to said ditch or the right to use the same.

For one thousand dollars damages and the costs of this action.

VAN CISE & WILSON,
Att'ys for Def't.

TERRITORY OF DAKOTA, *Lawrence County:*

Charles W. Beck, being sworn, says that he has heard read the foregoing answer and knows the contents thereof, and that the same is true, of his knowledge, except as to those things stated on information and belief, and that as to those things he believes it to be true.

CHARLES W. BECK.

Subscribed and sworn to before me this 26th day of July, A. D. 1887.

S. W. HOUGHTON,
Notary Public.

(Endorsed:) In district court. Daniel Sturr *vs.* Charles W. Beck. Answer. Service admitted by copy July 30, 1887. McLaughlin & Steele, att'ys for pl'ff. Filed August 27th, 1887. W. H. Jones, clerk.

15 TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

In District Court, First Judicial District.

DANIEL STURR, Pl'ff, }
vs.
CHARLES W. BECK, Def't. }

Reply.

The plaintiff, for reply to the counter-claim in defendant's answer, denies each and every allegation therein and prays judgment as in the complaint.

McLAUGHLIN & STEELE,
Attorneys for Plaintiff.

TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

Daniel Sturr, being first duly sworn, deposes and says that he is the plaintiff, has read the foregoing reply, knows the contents thereof, and knows the same to be true of his own knowledge, except as to statements therein on information and belief, and as to those matters he believes it to be true.

DANIEL STURR.

Subscribed and sworn to before me this 10th day of August, 1887.

WILLIAM L. McLAUGHLIN,
[SEAL.] *Notary Public.*

16 (Endorsed:) In district court. Daniel Sturr *vs.* Chas. W. Beck. Reply. McLaughlin & Steele, att'ys for pl'ff. Service acknowledged by copy this 11th August, 1887. Van Cise & Wilson, att'ys for Beck. Filed August 27th, 1887. W. H. Jones, clerk.

17 TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

In the District Court, First Judicial District.

DANIEL STURR, Plaintiff,
vs.
CHARLES W. BECK, Defendant.

Agreed Statements of Fact.

The respective parties to the above action, plaintiff and defendant, agree and stipulate that the facts in this case are as follows, and that the court may make its findings of facts and conclusions of law on them with the same effect as if proven in court:

1. That in the month of June, 1877, the plaintiff, Daniel Sturr, settled upon 160 acres of land in what is known and called False Bottom, in Lawrence county, Dakota Territory, through which False Bottom creek flowed, and on the 15th day of May, 1880, at the U. S. land office, in Deadwood, Dakota, filed his application to homestead the southeast quarter of the northwest quarter, the east half of the southwest quarter, and the southwest quarter of the southeast quarter of section 35, township 7 north, range 3 east, B. H. M., containing 160 acres, which he afterwards, on March 10th, 1883, proved upon at said land office, and for which a United States patent issued to him December 20th, 1883, and that said plaintiff has resided continuously upon and cultivated a part of said land since his settlement, in 1877.

2. That in March, 1877, one John Smith, the immediate grantor of the defendant Beck, settled upon 160 acres of land in the
18 same locality, situated immediately south of and adjoining said Sturr's claim and through which said False Bottom creek flowed, as shown in the diagram on page 7; that on the 25th day of

March, 1879, at the United States land office, in Deadwood, Dakota, said John Smith filed his application to homestead the west half of the southeast quarter, the southwest quarter of the northeast quarter, and lot 2, in section 2, township 6 north, range 3 east, B. H. M., containing 160.86 acres, which he afterwards proved upon at said land office, on March 10th, 1883, and for which a U. S. patent issued to him December 20th, 1883, and that said Smith resided continuously upon said land from his settlement, in 1877, until he sold the same to Beck, in May, 1884.

3. That said John Smith sold by warrantee deed, purporting to convey the fee to said defendant Beck, on May 1st, 1884, the beforementioned homestead adjoining that of Daniel Sturr, and delivered to him at the time the U. S. patent which he had received; that the defendant took possession of the premises and has lived there continuously since and cultivated a good part of the same.

4. That the plaintiff has had under cultivation the past three years not less than seventy acres sowed in wheat, oats, and hay, and planted in vegetables, and that the defendant has had similarly sowed and under cultivation not less than fifty acres.

5. That on or about the 15th of May, 1880, without a grant from John Smith, the occupant and claimant, the plaintiff located a water right on said Smith's homestead claim, at a point on the north bank of False Bottom creek, a few rods south of the south line of said
19 lot 2, where the creek turns to the west; posted a written notice there claiming the right to divert 500 inches of the waters of said creek, miner's measurement, calling the same therein the "Elm Tree" water right, and caused a copy of the same to be filed as a certificate in the office of the register of deeds of Lawrence county, D. T., on May 9, 1881, which was duly recorded in said office in Book 14, p. 468, and is in the words and figures following:

"Know all men by these presents that I, the undersigned, citizen of the United States and resident of the county of Lawrence and Territory of Dakota, claim by right of location and appropriation, for mining, milling, agricultural, domestic, or any other useful or beneficial purposes to which the same can be applied, the following-described water right, to wit, five hundred (500) inches, miner's measurement, of the waters of False Bottom creek, at a point on lot No. 2, section 2, township 6, range 3.

I claim the right to divert and convey said water by ditch, pipe, or flume to any point where it can be conveniently used for any of the aforesaid purposes.

This shall be known as the 'Elm Tree water right,' located May 15th, 1880, and ditch constructed and water turned into the same; date of certificate, May 9th, 1881.

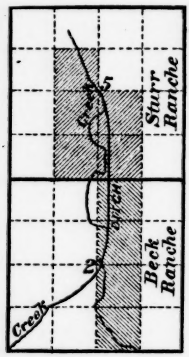
DANIEL STURR."

6. That after locating said water right plaintiff proceeded with due diligence and constructed a water ditch from the point of location across said lot 2 of Smith's homestead in a northerly direction to and upon his own homestead claim at a cost of about five

hundred dollars, and appropriated and used the waters of
20 said False Bottom creek through the same for the purposes of irrigation to the extent of at least three hundred inches, miner's measurement, on his own claim (and that such use was beneficial and profitable) each year thereafter on his growing crop until the summer of 1886, when the defendant Beck obstructed said ditch at a point on said lot 2, stopped the water, and flowed the same over his own fields on said lot 2, and irrigated his own crops with it.

7. That in the spring of 1886 the defendant Beck notified the plaintiff to cease diverting the waters of said creek from its usual channel, and forbade him from maintaining his ditch on defendant's land.

8. That the following diagram substantially shows the relative situation of the respective homesteads mentioned of Daniel Sturr and Charles W. Beck, the course of False Bottom creek into and through them, and the line of plaintiff's ditch diverting its waters, as heretofore stated:



9. That neither said John Smith or the defendant Beck made any use of the waters of said False Bottom creek upon the homestead claim of the former prior to the patenting of the same or since by means of any diversion or appropriation of the same from its natural channel in any ditch or canal except the use made by Beck from the ditch of plaintiff in 1886–'7, as hereinbefore stated.

21 10. That the custom now existing and which has existed since the early settlement of the country in the locality where the respective homesteads named are situated recognized and acknowledged the right to locate water rights and to appropriate and use the waters of flowing streams for the purpose of irrigating growing crops by means of ditches and canals.

11. That in ordinary seasons in the locality named irrigation is necessary for the crops planted and sowed, and without it they are usually failures; that there are in that locality the following-named ditches besides the plaintiff's: Henderson's, Todd's, Powers', Knight's, MacKenzie's; all used for the purpose of irrigation.

12. That on the first day of February, 1882, the plaintiff and the

said John Smith located a water right higher up False Bottom creek, in said Lawrence county, and called the same the Willow Grove water right; and on the second day of February, 1883, said plaintiff and said John Smith entered into a written contract in relation thereto, which contract was in the words and figures following, to wit:

This agreement, made and entered into this second day of February, A. D. 1882, between John Smith, of Lawrence county, D. T., of the first part, and Daniel Sturr, of the same county, party of the second part, witnesseth: That whereas the parties hereto did, on the 1st day of February, 1882, locate a certain water ditch on False Bottom creek, in said county and Territory, at a point on the ranch of John Deitschi, in said county, and filed the same in the office of the register of deeds of said county for record this 2nd day of
22 February, 1882, to which reference is hereby made for a more perfect description of said water right; and whereas the parties hereto are desirous and intend to build a ditch to carry all the water claimed by said right of way—500 inches, more or less—for irrigating the ranches of the respective parties: Now, in consideration of the premises, the parties hereto promise and agree one with the other that each will pay half of all the cost and expense of running and making said ditch from said point of commencement to the ranch of John Smith, emptying the water at the head of and into the ditch known as and called the "Elm Tree water right," owned by Daniel Sturr, in said county and Territory. It is further agreed by and between the parties that each party shall have exclusive right to use all the water which may flow through said ditch every other day during all seasons of the year. If either party fail to pay half the cost of making said ditch by the first day of June, 1882, — shall forfeit all right and title to the use of said water until the said delinquent shall pay his full share. It is further mutually agreed by and between the parties that the expenses of keeping said ditch in repair shall be borne equally by the parties.

In witness whereof we have this day, February 2d, 1882, signed our names and affixed our seals.

JOHN his x mark. SMITH. [SEAL.]
DANIEL STURR. [SEAL.]

In presence of—
WM. HAYDON.

23 TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

Be it remembered that on this second day of February, in the year one thousand eight hundred and eighty-two, before me, Wm. Haydon, notary public within and for said county and Territory, personally appeared John Smith and Daniel Sturr, well known to me to be the persons who are described in and who executed the fore-

going instrument, and severally duly acknowledged to me that they executed the same freely.

In witness whereof I have hereunto set my hand and official seal, at said county, the day and year above written.

WILLIAM HAYDON,
[SEAL.] *Notary Public.*

(Endorsed:) Agreement. John Smith and Daniel Sturr. Territory of Dakota, county of Lawrence. I hereby certify that this instrument was filed for record in my office at 3.25 o'clock p. m., Feb. 2, 1882, and is duly recorded in Book 21, page 281. J. S. Tracy, register of deeds, by J. McCarthy, deputy.

12. That upon attempting to open up and use said ditch one John Dietschi, who is the owner of the land on which the location was made, applied for and obtained an order of injunction enjoining and restraining said locators from using the same or in any way trespassing upon said Dietschi's property in connection therewith, and said injunction is still in force and effect.

24 13. That on the 20th day of December, 1883, a patent from the United States was issued to the said John Smith for his homestead claim, and which is in the words and figures following, to wit:

Patent. United States to John Smith.

Homestead certificate No. 39, application 10.

The United States of America to all to whom these presents shall come, Greeting:

Whereas there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Deadwood, Dak. T'y, whereby it appears that pursuant to the act of Congress approved 20th of May, 1862, "to secure homesteads to actual settlers on the public domain," and the acts supplementary thereto, the claim of John Smith has been established and consummated according to law for the west half of the southeast quarter, the southwest quarter of the northeast quarter, and the lot numbered two of section numbered two of township six north of range three east of Black Hills meridian, in Dakota Territory, containing one hundred and sixty acres and eighty-six hundredths of an acre, according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general:

Now, know ye that there is therefore granted by the United States unto the said John Smith the tract of land above described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said John Smith and to his heirs and assigns for-

25 ever, subject to any vested and accrued rights for mining, agricultural, manufacturing, or other purposes and rights to ditches and reservoirs used in connection with said water rights as may be recognized and acknowledged by the local customs, laws,

and decisions of the courts, and also subject to the right of a proprietor of a vein or lode to abstract and remove his ore therefrom should the same be found to penetrate or intersect the premises hereby granted, as provided by law.

In testimony whereof I, Chester A. Arthur, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the 20th day of December, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and eighth.

By the President:

CHESTER A. ARTHUR,
By W. H. CROOK, *Secretary.*
S. N. CLARK,
Recorder of the General Land Office.

[SEAL.]

Recorded, vol. 1, page 32.

McLAUGHLIN & STEELE,
Attorneys for Plaintiff.
VAN CISE & WILSON,
Attorneys for Defendant.

Deadwood, Dak., August 29, 1887.

26 *Findings of Fact.*

1st. That the pl'ff, Daniel Sturr, made a homestead filing or entry of the S. E. ¼ N. W. ¼, E. ½ S. E. ¼, and S. W. ¼ S. E. ¼ of sec. 35, town. 7 N., of range 3 E., B. H. M., on the 15th day May, 1880, and thereafter, at the U. S. land office at Deadwood, D. T., made final proof or entry thereof on the 10th day of March, 1883, having settled thereon in June, 1877, and he has resided thereon continuously ever since, cultivating at least seventy acres thereof, and has received a patent for said land from the United States.

2nd. That one John Smith made a homestead filing or entry of the W. ½ S. E. ¼, S. W. ¼ N. E. ¼, and lot 2 of sec. 2, town. 6 N., of range 3 E., B. H. M., on the 25th day of March, 1879, and thereafter, at the U. S. land office at Deadwood, D. T., made final proof or entry thereof on the 10th day of May, 1883, having settled thereon in March, 1877, and resided thereon until he sold the same to defendant Beck, in May, 1884, and has received a patent for said land from the United States.

3rd. That on or about the 15th day of May, 1880, the plaintiff, Daniel Sturr, without any grant from John Smith, the occupant and claimant, as above stated, went upon the homestead claim of John Smith, above described, and located a water right on said Smith's homestead, claiming the right to divert 500 inches, miner's measurement, of the waters of False Bottom creek then and long prior thereto flowing over and across said land in its natural channel, and to carry the same by means of a ditch to and upon his own homestead claim, immediately adjacent.

27 4th. That said plaintiff posted a written notice at the point of said proposed diversion, claiming the right to divert said water, and caused a copy of the same to be filed in the office of the register of deeds in and for Lawrence Co., Dakota, on the 9th day of May, 1881, and the same was recorded in Book 14, page 468, of the records of said county.

5th. That immediately thereafter the plaintiff constructed a ditch from the point of such diversion across the John Smith homestead and diverted and conveyed not less than 300 inches of the waters of said False Bottom creek to and upon his said land adjacent, and there used the same for irrigating his crops growing thereon whenever the same was necessary until interfered with by the defendant, in the summer of 1886.

6th. That on May first, 1884, John Smith conveyed his said homestead to the defendant, Charles W. Beck, by warranty deed, purporting to convey the fee without any reservation; whereupon the plaintiff entered into the possession thereof and has so remained ever since.

7th. That in the spring of 1886 the defendant Beck notified the plaintiff Sturr to cease diverting the waters of False Bottom creek from their natural channel upon defendant's said land, and forbade him maintaining his said ditch upon defendant's said land for that purpose.

8th. That the custom existing and which has existed in Lawrence county ever since its settlement recognizes and acknowledges the right to locate water rights and to divert, appropriate, and use the waters of flowing streams for purposes of irrigation when such

28 location, diversion, and use does not conflict or interfere with rights vested and accrued prior thereto.

9th. That neither John Smith nor the defendant Beck ever made any water-right location claiming the waters of False Bottom creek, and had not prior to the said location thereof by the pl'ff, Daniel Sturr, ever diverted the said waters from their natural channel where they had been accustomed to flow.

10th. That said John Smith, on the second day of February, 1882, recited in the written contract of that date made with the plaintiff, Daniel Sturr, that the latter was the owner of the Elm Tree water right, which was the said water right located as aforesaid by said Sturr on the 15th day of May, 1880.

11th. That the use of said water for irrigation is beneficial and valuable to the person or persons owning or possessing the same.

29 *Conclusions of Law.*

1st. That at the time of the location of the water right made upon John Smith's homestead by the plaintiff, Daniel Sturr, in May, 1880, a prior right to have the waters of said False Bottom creek flow in the regular channel of said creek over and across said land had vested in John Smith by virtue of his homestead filing or entry made on the 25th day of March, 1879, he having made final proof or entry thereafter.

2nd. That said vested right so acquired by said John Smith was conveyed to the defendant, Charles W. Beck, by warranty deed on May first, 1884.

3d. That the plaintiff, Daniel Sturr, by his location and diversion of the waters of False Bottom creek, so made by him upon the homestead of said John Smith on the 15th day of May, 1880, acquired no right as against the defendant Beck to divert said waters or to maintain a ditch upon defendant's land for that purpose.

4th. That the patent issued to John Smith for the premises mentioned related back to the date of his making his homestead filing or entry of said premises on the 25th day of March, 1879.

5th. That the plaintiff can take nothing by this action.

Let judgment be entered accordingly.

CHAS. M. THOMAS, *Judge.*

Dated Deadwood, D. T., August 29th, 1887.

30 To the 10th finding of fact and to conclusions of law Nos. 1, 2, 3, and 4 plaintiff, by his attorneys, McLaughlin & Steele, duly excepted at the time.

CHAS. M. THOMAS, *Judge.*

(Endorsed:) In district court. Daniel Sturr *vs.* Charles W. Beck. Agreed statement of facts. Findings of fact. Conclusions of law. Filed August 30th, 1887. W. H. Jones, clerk, by A. A. Raymond, deputy.

31 In District Court, First Judicial District of Dakota Territory, in and for Lawrence County.

DANIEL STURR, Pl'ff,
vs.
CHARLES W. BECK, Def't.

This action coming on to be heard upon the complaint and answer and reply and an agreed statement of facts submitted by counsel, Messrs. McLaughlin & Steele appearing for plaintiff and Messrs. Van Cise & Wilson for defendant, and the court being fully advised in the premises and having made and filed its decision in writing herein in favor of the defendant, now, on motion of his counsel, it is ordered, considered, adjudged, and decreed that the plaintiff take nothing by this action, that the complaint be dismissed upon the merits of the action, and that defendant do have and recover of and from the plaintiff his costs in this behalf expended, taxed by consent at $5.00.

Done in open court this 30th day of August, 1887.

By the court:

CHAS. M. THOMAS, *Judge.*

To which judgment and decree plaintiff at the time duly excepted, and judgment is signed without prejudice to plaintiff's right to move to correct and file a motion for a new trial within the time allowed by law.

CHAS. M. THOMAS, *Judge.*

32 (Endorsed:) Daniel Sturr *vs.* Chas. W. Beck. Decree for defendant. Filed August 30th, 1887. W. H. Jones, clerk, by A. A. Raymond, deputy.

33 TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

In District Court, First Judicial District.

DANIEL STURR, Plaintiff,
against
CHARLES W. BECK, Defendant.

Motion to Correct Findings of Fact and Conclusions of Law.

Now comes the plaintiff above named, Daniel Sturr, and moves the court to set aside certain of its findings of fact and conclusions of law and to adopt the following in their places, viz:

I.

Strike out finding No. 10 for the reason that the same does not correctly state the ultimate fact established by the written contract between John Smith and Daniel Sturr of date February 2, 1882, and insert the following in lieu thereof:

10. That in pursuance of the acknowledged and recognized custom of the country and locality where the "Elm Tree water right" is situated the said John Smith and Daniel Sturr, on the first day of February, 1882, located jointly another water-right location higher up False Bottom creek, on the ranch of one John Deitschi, and called the same the "Willow Grove water right," and on the following day said Smith made and entered into a written contract with Daniel Sturr, which was duly witnessed, acknowledged, and recorded, in which said Smith declared the purpose of said contract to be
34 the running and making of a ditch from the point of diversion on Deitschi's ranch to said Smith's ranch, and emptying the water at the head of and into the ditch known as and called the "Elm Tree water right, owned by Daniel Sturr, in said county and Territory," thereby recognizing and declaring the Elm Tree water right and ditch to be the property of said Daniel Sturr in the contract made with him as aforesaid.

II.

Strike out the first conclusion of law found by the court in this case, because the law applicable thereto is not therein correctly stated, and substitute therefor the following:

1. That at the time of the location of the "Elm Tree water right" by the plaintiff the United States was the riparian proprietor of the land whereon John Smith, defendant's grantor, had made a homestead filing or entry and through which False Bottom creek flowed; that said John Smith had only an inchoate interest and not a vested right in the land described as his homestead claim until

the tenth day of March, 1883, when he made final proof before the land office in Deadwood, D. T., of compliance with the law, and received from the register of said land office a homestead final receipt entitling him to a patent for the tract of land mentioned in it, and that this proof and the payment of the commission constituted the final entry and entitled him to a homestead final receipt, and that entitled him to a patent for the land, subject to any vested and accrued water rights of the plaintiff for purposes of irrigation and a right of way for his ditch used in connection therewith.

35 2. The final entry of said John Smith on March 10, 1883, and the patent which subsequently issued to him, December 20, 1883, constitute one title to the land described in it, and that the patent relates back to the said final entry.

III.

Strike out conclusion No. 2 as found by the court, for the same reasons given against conclusion No. 1, and insert the following:

1. That whatever rights had vested and accrued to John Smith by reason of his final entry of said described land under the homestead act and the issuance to him of the patent therefor were conveyed by him to the defendant, Charles W. Beck, May 1st, 1884, by warranty deed.

2. That the riparian proprietor of the public lands at the date of the filing of John Smith's homestead claim in the Deadwood land office and until the final entry of the same was the United States Government, which, through Congress, had long prior to the date of filing said claim recognized and legalized the custom of prior appropriation of the waters of non-navigable flowing streams in the Territories and Pacific States for mining, agricultural, manufacturing, or other purposes, and granted the right of way over its lands for the construction of ditches and canals used in connection with such water rights; that the usufruct in the water of flowing streams and the right of way for ditches and canals are a substantial property right, made separable from the fee by Congress, and may be acquired by appropriation and uses by the person or persons first appropriating the same; that Daniel Sturr was the first

36 appropriator as against the defendant and his grantor, John Smith, of the waters of said False Bottom creek, and is entitled to be maintained and protected in the same against the claim or claims of the defendant to the extent of at least 300 inches, miner's measurement, and a right of way for the ditch conveying the same from the point of diversion on said defendant's land.

3. That by priority of possession the right to the use of at least 300 inches of the waters of False Bottom creek, in Lawrence county, Dakota Territory, had vested and accrued in the plaintiff, Daniel Sturr, for the purposes of irrigation on his homestead claim, hereinbefore described, in the year 1880 as against the said John Smith and the defendant, Charles W. Beck, and this right to the use of the waters of said creek was recognized and acknowledged by the local customs of that locality.

priation and user by means of a ditch of at least 300 inches of the water in dispute in the year 1880 and in each subsequent year until 1886 for the purposes of irrigation on his ranch.

4. Because the court erred in making its conclusion of law No. 3, in this: Said conclusion inferentially states that said John Smith was the owner of the land described as his homestead claim in 1880, while in truth and in law he only had that year and the following years until March 10, 1883, a preference right to become the owner of said land upon showing performance of the condition imposed by law and the payment of the legal fees and commissions required to be paid. The United States was the owner and riparian proprietor until the final proof was made and the homestead final receipt was issued to him, March 10, 1883, and plaintiff Beck succeeded only to the right and title granted to Smith by the Government by virtue of the patent, and the grant was subject to the vested and accrued water rights and ditches of plaintiff used in connection with
42 said water rights; and it was error to refuse to strike out said conclusion of law and not adopt the one requested.

5. Because the court erred in making its conclusion of law No. 4, in this: The doctrine of relation stated is not correct and has no application and should have been stricken out and the one requested by the plaintiff adopted.

6. Because the decision is against law, in that it should have been for the plaintiff and against the defendant.

McLAUGHLIN & STEELE,
Attorneys for Plaintiff.

It is agreed and stipulated by and between the parties to this action that time is waived for the service of the motion for a new trial, and service of the notice is accepted and acknowledged instanter, that the decision of the court may be made on the motion *pro forma* without further delay.

McLAUGHLIN & STEELE,
Att'ys for Plaintiff.
VAN CISE & WILSON,
Att'ys for Def't.

Deadwood, D. T., September 12, 1887.

Upon reading the foregoing motion for a new trial in the above-entitled action, and after hearing counsel thereon, the same is denied and overruled.

CHAS. M. THOMAS, *Judge.*

43 To which order and ruling plaintiff at the time duly excepted.

CHAS. M. THOMAS, *Judge.*

Deadwood, D. T., September 13, 1887.

(Endorsed:) In district court. Daniel Sturr, pl'ff, *vs.* Charles W. Beck, def't. Mo. for new trial. Filed September 13th, 1887. W. H. Jones, clerk, by A. A. Raymond, deputy. McLaughlin & Steele, att'ys for pl'ff.

44 TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

In District Court, First Judicial District.

DANIEL STURR, Plaintiff,
vs.
CHARLES W. BECK, Defendant.

I, Charles M. Thomas, associate justice of the supreme court of the Territory of Dakota and judge of the first judicial district, do hereby order that a copy of the judgment-roll in this case be sent to the clerk of the supreme court in lieu of the original now on file in this court, and that the original notice of appeal and undertaking be attached to said copy and transmitted with the same to the clerk of the supreme court.

CHAS. M. THOMAS, *Judge.*

Deadwood, D. T., September 16, 1887.

45 TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

In District Court, First Judicial District.

DANIEL STURR, Plaintiff,
vs.
CHARLES W. BECK, Defendant.

I hereby certify the foregoing papers, to wit, the summons, complaint, answer, reply, agreed statement of facts, findings of fact and conclusions of law, motion to correct findings and conclusions of law, order denying and overruling same and exception thereto, motion for a new trial, order overruling and denying same and exception thereto, and the judgment of the court, are contained in and constitute the judgment-roll and the whole of such judgment-roll in the above-entitled action.

Witness my hand, at Deadwood, D. T., this 16th day of September, A. D. 1887.

CHAS M. THOMAS, *Judge.*

46 TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

In District Court, First Judicial District.

DANIEL STURR, Plaintiff,
vs.
CHARLES W. BECK, Defendant.

I, W. H. Jones, clerk of the district court within and for said county of Lawrence, in the first judicial district, in the Territory of Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript and copy of the judgment-roll and all the papers and proceedings upon which said judgment was

made and of the certificate of the judge in the above-entitled action, wherein Daniel Sturr is plaintiff and Charles W. Beck is defendant, as the same now remains on record in this court; that these copies are sent in lieu of the originals, in pursuance of an order of the court, September 16th, 1887.

I also certify that the attached notice of appeal and undertaking are the original notice of appeal served on me in this action, with the proof of service thereof, and the undertaking on appeal given thereon, both of which have been filed in this office; and I certify that these papers are transmitted to the supreme court of Dakota Territory pursuant to the appeal in this action.

Dated Sept. 17th, 1887.

[SEAL.] W. H. JONES,
Clerk Dist. Court.

47 TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

In District Court, First Judicial District.

DANIEL STURR, Plaintiff,
vs.
CHARLES W. BECK, Defendant.

I, Charles M. Thomas, associate justice of the supreme court of the Territory of Dakota and presiding judge of the first judicial district, do hereby certify that W. H. Jones was the duly appointed and acting clerk of this court on the 16th day of September, 1887, and that his signature to the foregoing certificate is genuine, and that the seal of said court is attached thereto, and that said certificate is in due form.

Dated Sept. 17th, 1887.

CHAS. M. THOMAS, *Judge.*

48 TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

District Court, First Judicial District.

DANIEL STURR, Plaintiff,
against
CHARLES W. BECK, Defendant.

You will please take notice that the plaintiff appeals to the supreme court of the Territory of Dakota from the decision & judgment of this court in this action entered on the 30th day of August, 1887, and from the whole thereof.

Dated Sept. 13th, 1887.

McLAUGHLIN & STEELE,
Attorneys for Plaintiff and Appellant.

To Van Cise & Wilson, attorneys for def't & respondent, and W. H. Jones, clerk of the district court.

(Endorsed:) District court, county of Lawrence. Daniel Sturr, plaintiff, against Charles W. Beck, defendant. Notice of appeal to supreme court. Service of a copy of the within notice acknowledged this Sept. 13, 1887. Van Cise & Wilson, att'ys for def't. W. H. Jones, clerk. McLaughlin & Steele, attorneys for plaintiff.

49 TERRITORY OF DAKOTA, } ss:
First Judicial District, }

In the District Court within and for Lawrence County.

DANIEL STURR, Appellant, }
vs.
CHARLES W. BECK, Respondent. }

Whereas on the 30th day of August, 1887, in the district court within and for the county of Lawrence, the above-named respondent recovered a judgment against the above-named appellant for the possession of a certain water right & water ditch & costs, taxed at five dollars;

And the above-named appellant, feeling aggrieved hereby, intends to appeal therefrom to the supreme court of the Territory of Dakota:

Now, therefore, we do hereby undertake that the said appellant will pay all costs and damages which may be awarded against him on said appeal or on dismissal thereof, not exceeding two hundred and fifty dollars, and do also undertake that if the said judgment so appealed from or in any part thereof be affirmed or said appeal be dismissed the said appellant will pay the amount directed to be paid by the said judgment or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages and costs which shall be awarded against said appellant on said appeal.

Dated September 13, 1887.

DAVID STURR.
HENRY RODENHAUS.
C. H. SPAULDING.

TERRITORY OF DAKOTA, } ss:
Lawrence County, }

On this 13th day of September, A. D. 1887, before me, the
50 subscriber, appeared Henry Rodenhaus and C. H Spaulding, to me personally known to be the same persons described in and who executed the above undertaking, and severally acknowledged that they executed the same.

[SEAL.] In witness whereof I have hereunto set my hand and official seal the day and year above written.

WILLIAM L. McLAUGHLIN,
Notary Public.

TERRITORY OF DAKOTA, } ss:
Lawrence County, }

Henry Rodenhaus and C. H. Spaulding, being severally sworn, each for himself, says—the said Henry Rodenhaus says he is a resident and householder of the county of Lawrence, in this Territory, and that he is worth the sum of $500.00 over and above all his debts and liabilities and exclusive of all property exempt from levy and sale on execution; and the said C. H. Spaulding for himself says that he is a resident and householder of the county of Lawrence, in this Territory, and that he is worth the sum of $500.00 over and above all his debts and liabilities and exclusive of all property exempt from levy and sale on execution.

HENRY RODENHAUS.
C. H. SPAULDING.

Subscribed and sworn to before me this 13th day of Sept., 1887.

WILLIAM McLAUGHLIN,
[SEAL.] *Notary Public.*

(Endorsed:) Territory of Dakota, county of Lawrence. In district court. Daniel Sturr *vs.* Charles W. Beck. Undertaking on appeal to supreme court. We acknowledge service of a copy of this undertaking Sept. 13, 1887. Van Cise & Wilson, att'ys for def't. Approved & filed Sept. 13th, 1887. W. H. Jones, clerk.

51 *Assignment of Errors.*

The appellant herein says that there is manifest error in the record in the court below, in this:

1. Because the court erred in its finding of fact No. 10 and in not correcting the same as requested by plaintiff in his motion to correct said finding.
2. Because the court erred in making conclusion of law No. 1.
3. Because the court erred in making conclusion of law No. 2.
4. Because the court erred in making conclusion of law No. 3.
5. Because the court erred in making conclusion of law No. 4.
6. Because the court erred in denying the motion for a new trial.
7. Because the decision of the court is against law.

(Endorsed:) 357. In supreme court of Dakota Territory. Daniel Sturr, appellant, *vs.* Chas. W. Beck, respondent. Transcript record in district court and appeal papers. Filed Sept. 28, 1887. J. H. C. Young, clerk. McLaughlin & Steele, att'ys for appellant.

52 TERRITORY OF DAKOTA, } ss:
County of Lawrence, }

In Supreme Court.

DANIEL STURR, Plaintiff,
vs.
CHARLES W. BECK, Defendant.

Stipulation.

It is hereby agreed and stipulated by and between the above-named parties that the hearing and disposition of the above-entitled action may be continued until the May term of the supreme court, 1888, at Yankton, and that the cause may then be disposed of on its merits without technical objections from either party.

McLAUGHLIN & STEELE,
Attorneys for Plaintiff.
VAN CISE & WILSON,
Attorneys for Def't.

Deadwood, D. T., January 16, 1888.

(Endorsed :) No. 357. In supreme court. Daniel Sturr *vs.* Charles W. Beck. Stipulation. Filed Feb'y 1, 1888. J. H. C. Young, clerk.

53 THE UNITED STATES OF AMERICA, } ss:
Territory of Dakota, }

In the Supreme Court.

DANIEL STURR, Plaintiff and Appellant,
vs.
CHARLES W. BECK, Defendant and Respondent. } May Term, A. D. 1888.

Appeal from the district court of Lawrence county.

This action coming on to be heard at the May, A. D. 1888, term of this court, at the supreme court room, in the city of Yankton, Territory of Dakota—present, Bartlett Tripp, chief justice, and William H. Francis, William B. McConnell, Charles M. Thomas, James Spencer, and John E. Carland, associate justices—and the appeal herein having been argued by W. R. Steele, Esq., for the appellant, and by John R. Gamble, Esq., for respondent, and the court having advised thereon, it is now here considered, ordered, and adjudged that the judgment of the said district court within and for said Lawrence county, appealed from herein, be, and the same is hereby, in all things affirmed.

And it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings according to law and the judgment of this court.

And it is further considered and adjudged that defendant & re-

spondent have and recover of the plaintiff and appellant costs
54 and disbursements on this appeal expended, taxed and allowed at forty-nine & $\frac{20}{100}$ dollars.

By the court:

BARTLETT TRIPP,
Chief Justice.

All the justices concurring, except Francis and Carland, JJ., dissenting.

(Endorsed:) 357. In supreme court, Territory of Dakota. May term, 1888. Daniel Sturr, plaintiff and appellant, *vs.* Charles W. Beck, defendant and respondent. Filed in open court this 25 day of May, 1888. J. H. C. Young, clerk. Remittitur sent down June 8, 1888.

55 $\frac{15}{357}$

STURR, Appellant,
vs.
BECK, Respondent.

The judgment of the lower court is affirmed.

The court holds that the homesteader was the prior appropriator of the water right, and the plaintiff has no right to enter upon the prior possession of the defendant under his H. E. for the purpose of appropriating any portion of the running streams and creeks thereon.

56 In the Supreme Court of Dakota. May Term, 1888.

DANIEL STURR, Appellant,
vs.
CHARLES W. BECK, Respondent.

In the above-entitled action it is hereby stipulated that the sum of fifteen dollars ($15.00) may be taxed as costs for respondent in addition to any unpaid costs of clerk and the costs allowed by statute.

Deadwood, D. T., May 28, 1888.

McLAUGHLIN & STEELE,
Att'ys for Appellant.
VAN CISE & WILSON,
Att'ys for Respondent.

Costs and Disbursements Taxed and Allowed.

Costs:

Before argument	$5 00
For argument	15 00
Term fee (1 term)	5 00

Disbursements:

Printing brief	15 00
Fees clerk supreme court	9 20
Total	$49 20

Done at Yankton, D. T., June 8, 1888.

J. H. C. YOUNG, *Clerk.*

57 In the Supreme Court of the Territory of Dakota.

DANIEL STURR, Appellant,
vs.
CHARLES W. BECK, Respondent.

Notice of Appeal.

To the above-named respondent and Van Cise & Wilson, his attorneys:

Take notice that Daniel Sturr, appellant in the above-entitled cause, appeals to the Supreme Court of the United States from the judgment rendered herein by the supreme court of the Territory of Dakota, at the May term, A. D. 1888, of said court, and which was filed with the clerk of said court May 25th, 1888, in favor of said respondent and against said appellant, and from each and every part and the whole of said judgment, and will ask for a citation to issue to you.

McLAUGHLIN & STEELE,
Attorneys for Appellant.

Deadwood, Dakota, November 28, 1888.

(Endorsed:) In supreme court. Daniel Sturr *vs.* Chas. W. Beck. Notice of appeal. Service of a copy of the within notice of appeal on us at Deadwood, Dakota, this 28th day of November, 1888, admitted. Van Cise & Wilson, att'ys for respondent. Supreme court of the Territory of Dakota. Filed Dec. 1, 1888. J. H. C. Young, clerk. McLaughlin & Steele, att'ys for appellant.

58 In the Supreme Court of the Territory of Dakota.

DANIEL STURR, Plaintiff and Appellant,
vs.
CHARLES W. BECK, Defendant and Respondent.

Affidavit that Value of Property in Controversy Exceeds in Value $5,000.00.

TERRITORY OF DAKOTA, *County of Lawrence:*

Daniel Sturr and Frederick W. White, being first duly sworn, each for himself and not one for the other, deposes and says: I know the ditch and water right in controversy in the above-entitled action

and am acquainted with the cost of constructing ditches for the purposes of irrigation and the value of water rights for the same purposes in the vicinity of the ditch and water right in question in said action, and said ditch and water right in controversy is reasonably of the value of five thousand dollars and more, to wit, $7,500.

DANIEL STURR.
FREDERICK W. WHITE.

Subscribed and sworn to before me this 27th day of November, 1888.

FRANK J. WASHABAUGH,
[SEAL.] *Notary Public.*

59 (Endorsed:) In supreme court. Daniel Sturr, appellant, *vs.* Chas. W. Beck, respondent. Aff. of value of matter in dispute. Supreme court of the Territory of Dakota. Filed Dec. 1, 1888. J. H. C. Young, clerk. McLaughlin & Steele, att'ys for appellant.

60 Know all men by these presents that we, Daniel Sturr, as principal, and Henry Rodenhaus and C. H. Spaulding, as sureties, all of Lawrence county, Dakota Territory, are held and firmly bound unto Charles W. Beck in the full and just sum of one thousand dollars, lawful money of the United States, to be paid to the said Charles W. Beck, his executors, administrators, heirs, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of November, 1888.

The above bond is upon the condition following:

Whereas lately, at the May term of the supreme court of the Territory of Dakota, A. D. 1888, and on the 25th day of May, in said last-named year, in a suit depending in said court between said Daniel Sturr, as appellant, and said Charles W. Beck, as respondent, judgment was rendered against said appellant and in favor of respondent, affirming in all things the judgment of the district court of the first judicial district of the Territory of Dakota in and for the county of Lawrence, theretofore in said district court rendered in favor of said Charles W. Beck, defendant and respondent, and against said Daniel W. Sturr, plaintiff and appellant, on the 30th day of August, A. D. 1887, dismissing plaintiff's action on the merits and awarding the defendant costs;

And whereas the said appellant has served notice of appeal from the said judgment of the supreme court of Dakota Territory
61 to the Supreme Court of the United States to reverse the said judgment in the aforesaid suit, and praying that a citation may issue admonishing said respondent and citing him to appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, 1889:

Now, if the said Daniel Sturr shall prosecute his said appeal to effect and answer all damages and costs that may be awarded to said respondent, including just damages for delay, and costs and interest

on the appeal if he shall fail to make good his plea, then the above obligation shall be void; otherwise to remain in full force and effect.

DANIEL STURR.
HENRY RODENHAUS.
C. H. SPAULDING.

Witness:
D. McLAUGHLIN.

TERRITORY OF DAKOTA, *County of Lawrence:*

Henry Rodenhaus and C. H. Spaulding, being severally sworn, each for himself says—the said Henry Rodenhaus that he is a resident and householder of the county of Lawrence, in this Territory, and that he is worth the sum of two thousand dollars over and above his debts and liabilities and exclusive of all property exempt from execution; and the said C. H. Spaulding for himself says that he is a resident and householder of the county of Lawrence, in this Territory, and is worth the sum of two thousand dollars over and above all his debts and liabilities and exclusive of all property exempt from levy and sale on execution.

HENRY RODENHAUS.
C. H. SPAULDING.

62 Subscribed and sworn to before me this 28th day of November, 1888.

WILLIAM L. McLAUGHLIN,
[SEAL.] *Notary Public.*

TERRITORY OF DAKOTA, *County of Lawrence:*

On this 28th day of November, 1888, before the undersigned, notary public in and for said county, personally appeared the above-named Henry Rodenhaus and C. H. Spaulding, known to me to be the persons who are mentioned in and whose names are subscribed to the foregoing instrument, and who each acknowledged to me that he executed the same freely and voluntarily.

WILLIAM L. McLAUGHLIN,
[SEAL.] *Notary Public.*

63 TERRITORY OF DAKOTA, } *ss:*
County of Lawrence, }

I hereby certify that I am personally well acquainted with Henry Rodenhaus and C. H. Spaulding, of Deadwood, Dakota, sureties on the appeal bond of Daniel Sturr to the Supreme Court of the United States in the foregoing-entitled action; that each of them is a freeholder and resident of said Lawrence county, and I consider each of them worth the amount for which he has qualified in said bond over and above all his debts, liabilities, and exemptions allowed by law, and that they are amply good and sufficient sureties on said bond on appeal.

Witness my hand and the seal of said district court this 28th day of November, 1888.

[SEAL.] W. H. JONES,
Clerk Dist. Court.

I consider the sureties on the above undertaking good and sufficient.

CHAS. M. THOMAS,
Associate Justice Supreme Court of Dakota Territory.

Appeal allowed, and the foregoing bond on appeal approved as to form and sufficiency of sureties, this 1st December, 1888.

BARTLETT TRIPP,
Chief Justice of the Supreme Court of Dakota Territory.

(Endorsed:) In supreme court. Daniel Sturr, appellant, *vs.* Chas. W. Beck, respondent. Appeal bond. Service of a copy of the within appeal bond on us, at Deadwood, Dakota, this 28th day of November, 1888. Van Cise & Wilson, att'ys for respondent. Supreme court of the Territory of Dakota. Filed Dec. 1, 1888. J. H. C. Young, clerk. McLaughlin & Steele, att'ys for appellant.

64 The United States of America to Charles W. Beck:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1889, pursuant to an appeal filed in the clerk's office of the supreme court of the Territory of Dakota from a judgment in said court rendered on the 25th day of May, A. D. 1888, in an action therein pending, wherein Daniel Sturr is plaintiff and appellant and you are the defendant and respondent, to show cause, if any there be, why the judgment rendered against said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this first day of December, A. D. 1888.

BARTLETT TRIPP,
Chief Justice of the Supreme Court of Dakota Territory.

(Endorsed:) In supreme court. Daniel Sturr *vs.* Charles W. Beck. Citation. Supreme court of the Territory of Dakota. Filed Dec. 10, 1888. J. H. C. Young, clerk. Service of a copy of the within admitted this 5th day of December, 1888, but without prejudice. Van Cise & Wilson, att'ys for respondent.

65 UNITED STATES OF AMERICA, } *ss:*
Territory of Dakota, }

In Supreme Court.

Cause.

DANIEL STURR, Plaintiff and Appellant,
vs.
CHARLES W. BECK, Defendant and Respondent.

Filed September 28, 1887.

Journal Entries.

In Supreme Court. February Term, 1888.

Tuesday, February 7, 1888, being the first day of the term.

* * * * * * *

On call of calendar.

* * * * * * *

In—

DANIEL STURR, Plaintiff and Appellant,
vs.
CHARLES W. BECK, Defendant and Respondent.

Continued on stipulation.

UNITED STATES OF AMERICA, *Territory of Dakota*, } *ss:*

In Supreme Court. May Term, 1888.

Tuesday, May 8, 1888, being the first day of the term.

* * * * * * *

On call of calendar.

* * * * * * *

66 In—

DANIEL STURR, Plaintiff and Appellant,
vs.
CHARLES W. BECK, Defendant and Respondent.

Counsel answers ready.

* * * * * * *

Wednesday, May 16, 1888, being the eighth day of the term.

* * * * * * *

In—

DANIEL STURR, Plaintiff and Appellant,
vs.
CHARLES W. BECK, Defendant and Respondent.

Cause argued.

Friday, May 25, 1888, being the sixteenth day of the term.

* * * * * * *

In—

DANIEL STURR, Plaintiff and Appellant,
vs.
CHARLES W. BECK, Defendant and Respondent.

Judgment of the district court within and for Lawrence county in all things affirmed.

67 TERRITORY OF DAKOTA, *ss:*

In Supreme Court.

I, James H. C. Young, clerk of the supreme court within and for the Territory of Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript and copy of all the papers filed in the supreme court of the Territory of Dakota in the above-entitled action, wherein Daniel Sturr is plaintiff and appellant *versus* Charles W. Beck, defendant and respondent, as the same now remains of record in said court, together with copies of the journal entries of the supreme court of the Territory of Dakota so far as relates to said case; also that the citation herewith is the original citation issued by said supreme court of the Territory of Dakota.

In witness whereof I have hereunto set my hand and affixed the seal of the said court this 3 day of May, A. D. 1889.

[Seal Supreme Court of Dakota Territory.]

JAMES H. C. YOUNG, *Clerk.*

Original citation herewith in addition to copy.

68 The United States of America to Charles W. Beck:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1889, pursuant to an appeal filed in the clerk's office of the supreme court of the Territory of Dakota from a judgment in said court rendered on the 25th day of May, A. D. 1883, in an action therein pending, wherein Daniel Sturr is plaintiff and appellant and you are the defendant and respondent, to show cause, if any there be, why the judgment rendered against said appellant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this first day of December, A. D. 1888.

BARTLETT TRIPP,
Chief Justice of the Supreme Court of Dakota Territory.

69 [Endorsed:] In supreme court. Daniel Sturr *vs.* Charles W. Beck. Citation. Supreme court of the Territory of Dakota. Filed Dec. 10, 1888. J. H. C. Young, clerk. Service of a copy of the within admitted this 5th day of December, 1888, but without prejudice. Van Cise & Wilson, att'ys for respondent.

Endorsed on cover: Dakota Territory supreme court. No. 1172. Daniel Sturr, appellant, *vs.* Charles W. Beck. Filed July 8, 1889.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1172.

DANIEL STURR, APPELLANT,

vs.

CHARLES W. BECK, RESPONDENT.

AFFIDAVITS.

TERRITORY OF DAKOTA, *Lawrence County:*

James H. Kearney, being first duly sworn, deposes and says that he is 24 years old and resides in section 2, township 6 north, of range 3 east, Black Hills meridian, in Lawrence county, Dakota, and has resided there for about ten years past; that the farm on which he lives adjoins the farms of the parties to this action, and he knows the ground well, and also the stream or branch called the "False Bottom creek," and is familiar with the flow of water in said stream and has been for years.

That the channel washed out by high water or floods in said creek passes over John Dietschi's farm onto the farm of the respondent, Charles W. Beck, and then flows onto my father's farm, above described, and where I reside, and then runs onto the farm of the appellant, Daniel Sturr.

That he is well acquainted with the ditch and water right claimed by said Daniel Sturr and has been since its location; that no water runs in the stream out of which said water right in controversy in this action was taken and has not run in same since the ditch was taken out, except in a freshet or flood some time in the spring, when the water is not needed. Usually it will not run more than a day or two after a rain, and then no water is needed for irrigation; that the water right in question has, in my opinion, absolutely no value and the entire cost of building the ditch by Sturr upon Beck's farm would not amount to one hundred dollars.

Affiant further says that in early days, in 1879 and 1880, and before there was much farming along this creek, that there was water in it most of the year and it run quite a good deal, and affiant's father and family got water out of this creek for domestic use and for watering stock, but that it continued to decrease, so that affiant's father and family have not been able for three or four years past to get sufficient water out of this stream for domestic use and for watering stock, and have sunk two wells for supplying those needs.

That in the spring or summer of 1877, after this ditch was taken out, there was quite a heavy rain and for a time a little water run in this ditch, and during a flood one year this ditch changed the channel, but, in my judgment, this ditch and water right never had any value whatever and was only a damage to Beck's farm and no benefit to Sturr.

JAMES H. KEARNEY.

Subscribed and sworn to before me this 23d day of September, 1889.

[SEAL.]

S. M. HOUGHTON,
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES. OCTOBER TERM, 1889. No. —.

DANIEL W. STURR, Appellant,

vs.

CHARLES W. BECK.

TERRITORY OF DAKOTA, *Lawrence County:*

William O. Heake, being sworn, says he is 32 years of age, and resides in Lawrence county, adjoining the ranch of Daniel Sturr, and about one mile from Charles W. Beck's place; that he is familiar with the branch or stream called "False Bottom creek," which crosses Beck's & Sturr's farms and from which the water right in controversy was taken, and has known said creek for the last five years; that it is a wet-weather stream, and in the spring, when the snows are melting and it is raining, the stream will run some years for quite awhile, but when summer comes the stream stops running. In my judgment, this stream never had a supply of water sufficient for irrigation, and that the water right located and claimed by the said Daniel Sturr has no value whatever and never had, and that the full value of the Sturr ditch is not to exceed one hundred, and would say about sixty dollars—I mean the cost of building the ditch, for it has no value.

W. O. HEAKE.

Subscribed and sworn to before me this 23rd day of September, 1889.

[SEAL.]

S. M. HOUGHTON,
Notary Public.

IN SUPREME COURT OF THE UNITED STATES. OCTOBER TERM, 1889. No. 1172.

DANIEL STURR, Appellant,

vs.

CHARLES W. BECK.

TERRITORY OF DAKOTA, } ss:
Lawrence County, }

Elham Smith, being sworn, says he is 41 years of age; a resident of Lawrence county, Dakota, since 1876; is well acquainted with the parties to this action; has known them since 1877, and is acquainted with their farms and with the water ditch and water right in controversy between them. This ditch and water right is taken from False Bottom creek. Affiant since 1877 has lived in the vicinity of this creek and near to the farms of Sturr and Beck, and has been during all the time since 1877 familiar with the flow of water in False Bottom creek. It is only a wet-weather stream, beginning to flow with the melting of snow in the spring and ceasing to flow when any dry time came, and not flowing again except in case of heavy rain. Since 1877 affiant can only recall one year that it flowed throughout the year, and that was an unusually wet year. The ditch and water right in controversy are practically valueless, because in any season that would furnish water enough to make a current in False Bottom creek there would be no need of irrigation to produce crops. Affiant is a farmer and has farmed about a mile from Mr. Beck's place since 1877, and he declares it as his judgment that there is no value to the matter in controversy between Sturr and Beck unless it would be the amount it cost to dig the ditch, which affiant thinks ought not to exceed fifty dollars.

ELHAM SMITH.

Subscribed and sworn to before me this 21st day of September, 1889.

[SEAL.]

S. M. HOUGHTON,
Notary Public.

IN SUPREME COURT OF UNITED STATES. OCTOBER TERM, 1889. No. 1172.

DANIEL STURR, Appellant,
vs.
CHARLES W. BECK.

TERRITORY OF DAKOTA, *Lawrence County,* } *ss*:

John Dietschi, being sworn, says he is 59 years of age; a resident of Lawrence county, Dakota. Since 1877 he has been living on False Bottom creek, on land owned by him, west of and adjoining the land now owned and occupied by Charles W. Beck, defendant, and upon which the ditch in controversy starts. Affiant is well acquainted with said ditch and with False Bottom creek and the water accustomed to flow therein. Affiant's land lies above Beck's, and the False Bottom channel runs for nearly three-fourths of a mile through affiant's land. The water in all ordinary seasons begins to run in said False Bottom channel with the spring thaw and melting of snow, and runs thereafter till the dry season comes, about June 15 to July 1. Thereafter it is dry again until the next spring. This has been the case nearly every year since affiant has resided there. The exceptions were in 1879 and 1887, and possibly some other year, when an unusually large amount of rain fell. In such years irrigation would not be necessary. Affiant is familiar with the subject of irrigation and with the value of ditches and water rights, and for the foregoing and other reasons he gives it as his judgment that the ditch and water right in controversy between the parties to this action were not in 1887 and are not at this time of any value whatever. Affiant knows the parties to this action and has known them since 1878, but has no interest in this controversy between them.

JOHN DIETSCHI.

Subscribed and sworn to before me this 23d day of September, 1889.

[SEAL.]

S. M. HOUGHTON,
Notary Public.

IN SUPREME COURT OF THE UNITED STATES. OCTOBER TERM, 1889. No. 1172.

DANIEL STURR, Appellant,

vs.

CHARLES W. BECK.

TERRITORY OF DAKOTA, *Lawrence County,* } ss:

Charles W. Beck, being sworn, says he is 41 years of age; a resident of Lawrence county, Dakota; that he is the defendant in this action, and has been since 1884 residing on False Bottom creek on the land described in his answer in this action; that since May, 1884, he has been well acquainted with False Bottom creek, and the water flowing therein; that it is only a wet-weather stream; that ordinarily the water has begun to flow in said creek, on affiant's place, with the spring rains and melting of snow, and continued to flow until the dry season, about June 15 to July 1; that in 1887 there was a little heavier spring rainfall, and for that reason the water flowed a little longer—till about the 15th of July. In 1888 the stream flowed about as in former years, as above stated, but after ceasing to flow there was a flood in July, that made a current in the creek for 10 days or two weeks. The stream then ceased to flow and there has been no current in it on affiant's place at any time since that date. Affiant is familiar with irrigating ditches and their value, and he states it as his judgment that the ditch in controversy in this action and the water right claimed by the appellant in connection therewith had very little estimable value in 1887, say $1,000, provided the water should run every season as it ran that year, and that said ditch and water right, at the present time and as the water has run other seasons than 1887, have no value whatever.

Affiant further says that affiant has offered to Daniel Sturr, appellant, and to Daniel McLaughlin, his attorney, to sell his farm, described in the pleadings in this action, with improvements thereon, which alone are reasonably worth $3,500, and all adverse claim to the water right and water ditch in controversy, for $5,000.00, and is still willing and here offers to take that amount therefor. In this offer he includes the improvements aforesaid, consisting of a two-story stone house that cost $2,500, a large frame barn that cost $1,000, stone milk-house that cost $150, and fences and other improvements that cost at least $500 more, besides the 160 acres of land, which cost him $1,500.

CHARLES W. BECK.

Subscribed and sworn to before me this 23d day of September, 1889.

[SEAL.] S. M. HOUGHTON,
Notary Public.

TERRITORY OF DAKOTA, }
County of Lawrence, } *ss:*

I, W. H. Jones, clerk of the district court of the first judicial district in and for Lawrence county, Dakota Territory, the same being a court of record, do hereby certify that S. M. Houghton, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument, was at the time of taking such proof or acknowledgment a notary public in and for said county, duly authorized by law to take the same; and, further, that I am well acquainted with the handwriting of said S. M. Houghton and verily believe that his signature to the said certificate of proof or acknowledgment is genuine; and I further certify that said

instrument is executed and acknowledged according to the laws of the Territory of Dakota.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Deadwood, this 25th day of September, A. D. 1889.

[SEAL.]

W. H. JONES, *Clerk*,
By LOUIS SAULFIELD, *Deputy*.

Office Supreme Court U. S.
FILED.
SEP 16 1889
JAMES. H. McKENNEY,
CLERK.

IN THE

SUPREME COURT,

OF THE UNITED STATES.

OCTOBER TERM, 1889.

Appeal from the Supreme Court of the Territory of Dakota.

DANIEL STURR, Appellant,
vs.
CHARLES W. BECK, Respondent.

Brief and Argument for Appellant.

DANIEL McLAUGHLIN,
WILLIAM R. STEELE,
Attorneys for Appellant.

Deadwood Daily Pioneer Print.

IN THE

SUPREME COURT,

OF THE UNITED STATES.

Appeal from the Supreme Court of the Territory of Dakota.

DANIEL STURR, Appellant,
vs.
CHARLES W. BECK, Respondent.

Brief and Argument for Appellant.

STATEMENT OF FACTS.

The Appellant Sturr, was the plaintiff below. In June, 1877, he settled on a 160 acre tract of public land on Falsebottom valley, Lawrence County, Dakota Territory, and made a homestead entry thereon, May 15, 1880. On the same day he located a water right a short distance above or south of his claim on the homestead claim of one John Smith, claiming 500 inches of the water of Falsebottom Creek for mining, agricultural, manufacturing or other purposes, which he called the "Elm Tree water right;" completed a ditch partly across

Smith's claim, and partly on his own, at a cost of about five hundred dollars in July following, that flowed not less than three hundred inches of water, miners' measurement, from Falsebottom Creek upon his field, which he used for the purpose of irrigation in the summer of that year, and every summer thereafter until 1886, when the Appellee Beck, interfered and prevented him from using it, and took possession of the ditch and water and used the latter in irrigating his own fields, and has ever since prevented the Appellant from using the same.

(See paragraphs 1, 5, 6, 8, of "AGREED STATEMENT OF FACTS" Printed Record pp. 10, 11, 12, 13, 14.)

John Smith settled upon a 160 acre tract of the public land in the same valley, just south of and adjoining the appellant's, in March, 1877, and made a homestead entry thereon, March 25, 1879. He seems to have made no objection to Appellant appropriating and diverting the water of the creek, and constructing the ditch over a part of his claim. Both Appellant and Smith made their final proof in the land office at Deadwood, Dakota, on March 10th, 1883, and patents for their respective homesteads issued to each December 20, 1883, containing the usual exceptions as to vested water rights and right of way for ditches.

(See paragraphs 2, 8, 9, 14, Ibid. pp. 10, 13, 16, 17, Pr. Rec.)

The local custom, existing since the early settlement of the country where these respective homesteads are situated, and which existed at the commencement of this action, recognized and acknowledged the right to locate water rights and to appropriate and use the water of flowing streams for the purposes of irrigating crops, by means of ditches and canals.

(Paragraphs 10, 11, Ibid. pp. 13, 14. Pr. Rec.)

On the first of February, 1882, John Smith recognized and acknowledged that Appellant owned the Elm

Tree ditch and water right, in a written contract of that date, with the Appellant, which was duly acknowledged by them, and recorded in the office of the Register of Deeds the next day.

(Paragraph 12, Ibid. pp. 14, 15, Pr. Rec.)

On the 1st of May, 1884, John Smith sold and conveyed his homestead by warrantee deed, to the Appellee; who now claims in virtue thereof, to be the riparian owner entitled to have the waters of Falsebottom Creek flow in its channel across his land, notwithstanding the exceptions in the patent in favor of vested rights to the use of water, and right of way over the land for ditches and canals, and for reservoirs used in connection therewith. He also claims that the patent to Smith takes effect by relation as of the date of the homestead entry, March 25, 1879, and is therefore prior to the location of the Elm Tree water right by Appellant, May 15, 1880; and admits that in the summer of 1886, after notification to him that spring, he prevented Appellant from using said water right and ditch and has used the same for his own purposes ever since.

(Paragraphs 6, 7, 9, 14, Ibid. pp. 12, 13, 16, 17, Pr. Rec.)

Appellee also admits that in ordinary seasons in the locality named, irrigation is necessary for the crops planted and sown, and without it they are usually failures; that the Appellant has had under cultivation for the past three years (prior to 1887) not less than seventy acres sown in wheat, oats, hay and vegetables; and that he has used his said Elm Tree water right and ditch to the extent of not less than 300 inches, miners measurement, for irrigating his own crops on his own claim from the summer of 1880 until the summer of 1886, when his ditch was obstructed by Appellee, and he was deprived of the use of his said water right.

(Paragraphs 4, 6, 11, Ibid. pp. 11, 12, 14, Pr. Rec.)

Neither John Smith or the Appellee made any use of the water of Falsebottom Creek upon the homestead claim of the former, prior to the patenting of the same, or since, by means of any appropriation or diversion of the same, except the u-e made in 1886 and since by Appellee in obstructing Appellant's ditch and using the Elm Tree water right to irrigate his own crops on his claim.

(Paragraph 9, Ibid. p. 13, Pr. Rec.)

The case was argued and submitted to the District Court, on an "AGREED STATEMENT OF FACTS." The Appellant relying on the doctrine of prior appropriation of water on the public land and its beneficial use, for an injunction to restrain the Appellee from interference with his said water right and ditch; and the Appellee opposing this claim of the Appellant, by the pretence that the homestead entry of John Smith made March 25, 1879, vested the title of the land in the latter, took the homestead out of the public land, and made him the riparian owner. It is also contended that the patent took effect by relation, as of the date of the homestead entry, and that the right to the land and water had vested in Smith, prior to the location of the Elm Tree water right.

The District Court made findings of fact and conclusions of law favorable to the defendant (Appellee) and against the plaintiff (Appellant) in the court below, to some of which exceptions were taken at the time by plaintiff's counsel, and dismissed the complaint on its merits at plaintiff's cost. Motions to correct such findings, and conclusions of law, and for a new trial were made in the lower court, alleging errors of law therein, which were overruled and denied.

The finding of fact excepted to is as follows:

"10. That said John Smith, on the 2nd day of February, 1882, recited in a written contract of that date,

made with the plaintiff, Daniel Sturr, that the latter was the owner of the Elm Tree water right, which was the said water right located as aforesaid by said Sturr on the 15th day of May, 1880."

(Pr. Rec. p. 20.)

which plaintiff's counsel moved to have corrected as follows, in accordance with the 12th paragraph of the agreed statement of facts.

(See Pr. Rec. p. ~~14-15~~.)

"10. That in pursuance of the acknowledged and recognized local customs of the country and locality, where the 'Elm Tree water right' is situated, the said John Smith and Daniel Sturr, on the 1st of February, 1882, located jointly another water right location higher up Falsebottom creek, on the ranch of one John Deitschi, and called the same the 'Willow Grove water right,' and on the following day, the said Smith made and entered into a written contract with Daniel Sturr, which was duly witnessed, acknowledged and recorded, in which said Smith declared the purpose of the contract to be the running and making of a ditch from the point of diversion on Deitschi's ranch to said Smith's ranch, and 'emptying the water at the head of and into the ditch known as and called the 'Elm Tree water right,' owned by Daniel Sturr in said county and Territory;' thereby recognizing and declaring the 'Elm Tree water right' and ditch to be the property of said Daniel Sturr, in the contract made with him as aforesaid."

(Pr. Rec. pp. ~~24, 25~~.)

The refusal of the court to correct, as thus requested, was, and is now, assigned as error.

(Pr. Rec. p.

This record acknowledgment of Smith that Sturr

was the owner of the "Elm Tree water right," together with the latter's record of his location May 15th, 1880, was notice to Beck when he purchased, that Sturr claimed and Smith acknowledged, that he had a vested right to the use of the water of the creek to the extent of 300 inches and a right of way for his ditch over his homestead; and in connection with the exception in the patent could properly be urged as an estoppel, and the finding should have been corrected as requested.

The District Court made the following conclusions of law in the case, to each of which exceptions were taken at the time, by plaintiff's counsel: and are assigned as errors.

(Pr. Rec. p. 14 15)

"1. That at the time of the location of the water right made upon John Smith's homestead by the plaintiff, Daniel Sturr, in May, 1880, a prior right to have the said Falsebottom creek flow in the regular channel of said creek over and across said land *had vested* in John Smith *by virtue of his homestead filing, or entry, made on the 25th day of March*, 1879, he having made final proof or entry thereafter.

2. That said *vested right* so accrued to said John Smith was conveyed to the defendant, Charles W. Beck, by warrantee deed on May 1st, 1884.

3. That the plaintiff, Daniel Sturr, by his location and diversion of the waters of Falsebottom creek so made by him upon the homestead of said John Smith, on the 15th day of May, 1880, *acquired no right as against the defendant Beck to divert said waters or to maintain a ditch upon defendant's land for that purpose.*

4. That the patent issued to John Smith for the premises mentioned, *related back to the date of his making his homestead filing, or entry, on the 25th day of March*, 1879."

The plaintiff's counsel moved the court to correct these conclusions of law,

(Pr. Rec. p. 21.) 16, 17, 18.

and subsequently, and within two days, asked the court by motion to correct the same, as follows:

"Strike out the first Conclusion of Law found by the Court in this case, because the law applicable thereto is not therein correctly stated, and substitute therefor the following:

1 That at the time of the location of the "Elm Tree water right" by the plaintiff, the United States was the riparian proprietor of the land whereon John Smith, defendant's grantor, had made a homestead filing or entry, and through which Falsebottom creek flowed; that said John Smith had only an inchoate interest and not a vested right in the land described as his homestead claim, until the 10th day of March, 1883, when he made final proof before the land office in Deadwood, D. T., of compliance with the law, and received from the Register of said land office a Homestead Final Receipt, entitling him to a patent for the tract of land mentioned in it; and that this proof and the payment of the commission constituted the final entry and entitled him to a Homestead Final Receipt, and that entitled him to a patent for the land subject to any vested or accrued water rights of the plaintiff for purposes of irrigation, and a right of way for his ditch used in connection therewith.

2. The final entry of said John Smith on March 10th, 1883, and the patent which subsequently issued to him December 20th, 1883, constitute one title to the land described in it; and that the patent relates back to the said final entry.

III.

Strike out conclusion No. 2, as found by the court, for the same reasons as given for conclusion No. 1, and insert the following:

1. That whatever rights had vested and accrued to John Smith by reason of his final entry of said described land under the Homestead Act. and the issuance to him of a patent therefor, were conveyed by him to the defendant, Charles W. Beck, May 1st, 1884, by warrantee deed.

2. That the riparian proprietor of the public lands at the date of the filing of John Smith's homestead claim, in the Deadwood land office, and until the final entry of the same, was the United States government, which through Congress, had long prior to the date of filing said claim recognized and legalized the custom of prior appropriation of non-navigable flowing streams in the Territories and Pacific States, for mining, agricultural, manufacturing and other purposes, and granted the right of way over its lands for the construction of ditches and canals used in connection with such water rights. That the use of the waters of flowing streams, and the right of way for ditches and canals, are a substantial property right, made separable from the fee by congress, and may be acquired by appropriation and use, by the person or persons first appropriating the same. That Daniel Sturr was the first appropriator as against the defendant and his grantor, John Smith, of the waters of said Falsebottom creek, and is entitled to be maintained and protected in the same, against the claim or claims of the defendant, to the extent of, at least, 300 inches, miners' measurement, and a right of way for the ditch conveying the same from the point of diversion on said defendant's land.

3. That by priority of possession, the right to the use of at least 300 inches of the water at Falsebottom creek, Lawrence County, Dakota Territory, had vested and accrued to the plaintiff, Daniel Sturr, for the purposes of irrigation on his homestead claim, herein before described, in the year 1880, as against the said John Smith and the defendant, Charles W. Beck, and this right to the use of the waters of said creek was

recognized and acknowledged by the local custom of that locality.

IV.

Strike out Conclusion of Law. No. 4, as found by the Court, for similar reasons as heretofore given against conclusion No. 1, and insert the following instead:

1. That the patent of date, December 20th, 1883, issued to John Smith for his homestead claim heretofore described, expressly reserves from the grant made by that instrument, any "vested or accrued water rights" and "rights to ditches," "used in connection therewith," that was recognized and acknowledged by the local customs, laws and decisions of the courts; and plaintiff's water right and ditch were so recognized by the local customs. That said patent related back to the final entry of said homestead claim, and in connection therewith constitutes one title.

Which motion was overruled, to which ruling the plaintiff by his counsel then and there excepted.

(Pr. Rec. pp. 22, 23, 24.)

A motion for a new trial was made in the District Court based on these alleged errors, and was as follows:

1. Because the Court erred in making its finding of Fact No. 10, erred in not correcting the same as requested by plaintiff in his motion to correct Findings of Fact and Conclusions of Law, in this: Said finding is only a partial one and does not show or state the ultimate fact evidenced by the written agreement made by John Smith, defendant's grantor, and the plaintiff, February 2nd, 1882: and because the correction desired and requested to be made by the plaintiff shows the ultimate fact that said John Smith recognized and acknowledged in writing, duly acknowledged and recorded on the second day of February, 1882, Daniel Sturr, the

plaintiff, to be the owner of the Elm Tree water right and the ditch used in connection therewith, and in accordance with the local custom of the locality undertook in connection with said plaintiff to locate another water right above it on John Dietschi's ranch and connect the same with the Elm Tree water right, on the first of February, 1882.

2. Because the Court erred in making and finding Conclusion of Law No. 1, in this: Said conclusion is contrary to the fact found as No. 2, and to the agreed statement of facts as defendant's grantor, John Smith, only had the inchoate rights of a homestead claimant at the date named in said Conclusion of Law, and had no "vested right" in the premises described in the answer as the John Smith homestead, until final proof was made, and the "Homestead Final Receipt" was issued therefor, March 10, 1883. That until that date at least, and until the patent for said land was issued to him, the United States alone was the riparian proprietor of said land and of the non-navigable streams flowing through it, and the only person who might lawfully assert its ownership to the flowing waters in the bed of the stream, without first having appropriated and used the same for some beneficial purpose by artificial means: and said conclusion is not supported by the patent which issued to said John Smith, December 20th, 1883, which expressly burthens and conditions the grant therein made, and makes the same subject to any vested and accrued water rights for mining, *agricultural*, manufacturing or other purposes, and to the right of way for ditches used in connection therewith. And also because the court did not strike out said conclusion and find as requested by plaintiff in his said motion.

3. Because the Court erred in making its Conclusion of Law No. 2, in this: No *vested right* had or could accrue in said lands or stream to said John Smith by virtue of being a homestead claimant until final proof of compliance with the law and the issuance to him by

the proper land officer of a "Homestead Final Receipt." The title to said land remained in the United States until the 20th of December, 1883, and it was the riparian proprietor of said land until the final proof was made by John Smith that he had in all things complied with the law relating to Homesteads and the Homestead Final Receipt was issued to him. That plaintiff is found—as between the parties to this action —to have made an appropriation and use, by means of a ditch, of at least 300 inches of the water in dispute in the year 1880, and in each subsequent year until 1886, for the purpose of irrigation on his ranch.

4. Because the Court erred in making its Conclusion of Law No. 3, in this: Said conclusion inferentially states that said John Smith was the owner of the land described as his homestead claim, in 1880, while in truth and in law, he had only, that year and the following years until March 10, 1883, a preference right to become the owner of said land upon showing performance of the conditions imposed by law, and the payment of the legal fees and commissions required to be paid. The United States was the owner and riparian proprietor until the final proof was made, and the Homestead Final Receipt was issued to him, March 10, 1883, and plaintiff, Beck, succeeded only to the right and title granted to Smith by the government, by virtue of the patent, and the grant was subject to the vested and accrued water right and ditch of plaintiff used in connection with said water right. And it was error to refuse to strike out said Conclusion of Law and not adopt the one requested.

5. Because the Court erred in making its Conclusion of Law No. 4, in this: The doctrine of relation stated is not correct, and has no application, and should have been stricken out and the one requested by the plaintiff adopted.

6. Because the decision is against law, in that it

should have been for the plaintiff and against the defendant.

The foregoing motion for a new trial in the above action, was denied and overruled.

To which ruling plaintiff counsel at the time duly excepted.

(Pr. Rec. pp. 24, 25, 26, 27.)

An appeal was taken from the rulings, decision and the decree of the District Court to the Supreme Court of the Territory, assigning error in these rulings and decisions which at the May Term, 1888, which approved and affirmed them in all things. From this last decision an appeal was taken to this court, and the case is now submitted on printed briefs and arguments

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THE RIGHTS ACQUIRED BY HOMESTEAD ENTRY!

Does a homestead settler on the public lands, become the riparian proprietor, by virtue of a homestead entry, prior to his making final proof? And,

Does a homestead entry change the character of the land from public to private before final proof and the issue of the certificate to the homesteader?

Upon the answers, our cause depends. If yea, then the Appellant has no cause to complain: If nay, the District and Supreme Courts of Dakota erred in their rulings and decision, and the decree should be reversed.

We presume it will not be controverted, that, until it parts with its ownership, the Government is the riparian proprietor of the public lands; and that it is

competent for congress "to dispose of and make all needful rules and regulations respecting the territory * * * * belonging to the United States." If it has therefore, provided methods of disposition of its lands of late years, that its grants are subject to certain exceptions in favor of "vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights," who shall say it, nay!

This court said in the case of Atchison vs. Peterson (20 Wall. at p. 510) decided in 1874, "By the custom which has obtained among miners in the Pacific States and Territories, where mining for the precious metals is had on the public lands of the United States, the *first* appropriator of mines, whether in placers, veins or lodes, or of *water* in the streams on such lands for mining purposes, is held to have a better right than others to work the mines, or *use* the waters."

The court then proceeded to a consideration of the doctrine of the common law in relation to riparian rights, and said:

"As respects the *use* of water for mining purposes, the doctrine of the common law declaratory of the rights of riparian owners, were, at an early day, after the discovery of gold, found to be inapplicable or applicable only in a very limited extent to the necessities of miners and inadequate to their protection."

(*Id. at p.* 511.)

The act of Congress of 1866 recognizing the doctrine of prior appropriation of water, is referred to; and the cases of *Irwin vs. Phillips*, 5 *Cal.* 140; *Butte Canal and Ditch Co. vs. Vaughn*, 11 *Cal.* 143; *and Ortman vs. Dixon*, 13 *Cal.* 33, *are* cited approvingly, as containing the correct rule as to prior appropriation and uses of water for mining purposes, which are there applied by the court

to the case under consideration; which case was from Montana Territory, and affirmed the decision of its Supreme Court in the case.

In a later case at the same term, (Oct., 1874) decided on appeal from the Supreme Court of Montana, (*Basey vs. Gallagher* 20 *Wall.*) this court affirmed the doctrine of prior appropriation and use of water, on the public lands, and applied it to purposes of agriculture. The Court say, at p. 681:

"The question on the merits in this case is, whether "a right to running waters on the public lands of the "United States, for purposes of irrigation, can be ac- "quired by prior appropriation as *against* parties not "having the title of the Government. Neither party "has any title from the United States; no question as to "the rights of riparian owners can therefore arise. It "will be time enough to consider those rights when "either of the parties has obtained the patent of the "Government. At present, both parties stand on the "same footing; neither can allege that the other is a "trespasser against the government without, at the same "time, invalidating his own claim."

After repeating its doctrine as laid down in Atchison vs. Peterson, the Court say:

"The views there expressed and the rulings made, "are equally applicable to the use of water on the pub- "lic lands for purposes of *irrigation*. No distinction is "made in those states and territories, by the *custom* of "miners or settlers, or by the courts, in the rights of the "first appropriator, from the use made of water, if the "use be a beneficial one." (at p. 682.)

Again, in the same case:

"Several decisions of the Supreme Court of Montana "have been cited to us recognizing the right, by prior "appropriation, of water for purposes of mining on the "public lands of the United States; and, there is no *solid*

"*reason*" for upholding the right, when the water is thus "used, which does not apply with the same force, when "the water is sought on those lands for any other equally "beneficial purpose." (*at p.* 685.)

In a still later case (Broder vs. Natoma Water Co. 101 U. S. 276) decided in 1879, this court re-affirmed the principle of the right to appropriate the waters of streams on the public lands, as laid down in Atchison vs. Peterson and Basey vs. Gallagher, and they add, that in their opinion, the right to the use of water on the public lands by prior appropriation, was pre-existent to the act of Congress of July 26, 1866.

So understanding it, Congress passed the act of July 26th, 1866, recognizing the right to the use of water "by priority of possession" for mining, agricultural, manufacturing or other purposes, as something that could vest and accrue to a person as a *distinct right*, separate from the land over which it flowed, and that the owner of such right should be maintained and protected in the same.

(*Sec.* 2339 *U. S. R. S.*)

By an amendment passed by Congress July 9th, 1870, it is expressly provided that "All patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, *as* may have been acquired under or recognized by the preceding section."

(Sec. 2340 U. S. R. S.)

"Pre-emptions or homesteads *allowed!*" Allowed by whom, and when? By the officers of the land department, i. e., the land officers, when proof, and payment of the minimum price is made to them in the one case, and final proof of five years actual settlement upon and cultivation of the land, in

the other. The allowance is made by the issue of a certificate in each case, that the person named therein is entitled to a patent for the land described in it. That is what we understand by the term "allowed" in this section. There are and have been patents authorized for portions of the public lands, other than those issued in pursuance of the pre-emption and homestead laws. Congress has granted lands, *in praesenti*, and *in futuro* to railroads, colleges, schools etc., sometimes conditionally and sometimes absolutely. We understand that the language of the first part of section 2340, "All patents granted," refers to direct legislative grants of this kind and we conclude that so far as the right to the use of water on the public land by prior appropriation is involved, the pre-emption and homestead claimants are in the same right, and that neither is a riparian owner until the certificate issues to him, which is the basis of the patent.

This brings us to consider what riparian rights, if any, a homesteader acquires by homestead entry. Who is the riparian proprietor after such entry, and before the issuance of the certificate after final proof? Is it the Government or the homestead claimant? Has the latter any more right to be considered the riparian owner than a pre-emptioner after settlement and filing his Declaratory Statement? We will answer these questions fairly, if we can. The right to the use of flowing water on the public lands in the Western States and Territories for mining, manufacturing, agricultural and other purposes and the right of way for the construction of ditches and canals connected with said use has been recognized and acknowledged since 1849, by the local customs, laws and decisions of the courts, as a right arising from the necessities of natural conditions; and that the right to its use was separable from the public land through or over which it flowed. Prior appropriation and user were the only conditions necessary to vest a property interest in flowing water. Like possession of mineral lands, it was separable from the fee, and became—first by custom and afterwards by Act of Congress, a separate independent property right to be maintained and protected.

We will have no contention with opposing counsel as to what the common law doctrine of riparian rights is; merely suggesting, it can have no application to the case at bar, if we are correct in maintaining the position, that a homesteader does not become the proprietor of the tract of public land on which he settles, by merely making a homestead entry thereon. It still remains public land, with the paramount title in the Government. The Government continues to be the riparian proprietor, after such entry and until final proof and the issue of the certificate, unless some person under the customs, has acquired by prior appropriation the right to use the same for some beneficial use; when this right becomes distinct and separable from the paramount title to the land.

Section 2290 of the Revised Statutes of the United States provides that a person who is entitled to make a homestead entry shall make and file an affidavit containing certain facts, with the register and receiver, and upon the payment of ten dollars he shall thereupon be permitted to enter the amount of land (160 acres) specified. But the next section (2291 U. S. R. 'S.) states that "No certificate however, shall be given, or patent issued therefor, until the expiration of five years from the date of such *entry*."

The term "entry" as used in the homestead enactments, does not mean a completed entry that at once passes to the settler the equitable title to the land claimed, and makes the Government only the trustee of the legal title for the homestead claimant. At least our contention is, that it does not. Besides initiating a settlement on the tract, making and filing the necessary affidavit and application for homestead in the land office, paying the ten dollars entry fee and commission, the homesteader is still further required by law, to reside upon and cultivate the land, and, at the expiration of five years from the date of such entry, or within two years after such expiration, *to make proof* before the register and receiver of his actual and continued settlement upon

and cultivation of the land, that he has not alienated the same, and is the *bona fide* owner thereof as an actual settler, and that he will bear true allegiance to the Government of the United States. The proof offered must be examined and its sufficiency passed upon by the land officers and if found satisfactory a "Homestead Final Certificate" is issued by them to the homesteader "as the *basis* of a patent."

(*U. S. Rev. Stat. Sec.* 2338 *Subd.* 3.)

This court determined in the case of Smelting Co. vs. Kemp (104 U. S. at p. 940-1) at the October, 1881 Term, that land officers are called upon to hear testimony presented for their consideration in supervising the various proceedings taken to obtain the Government title, from their commencement to their close. That the law contains provisions designating the persons who may acquire it and the *terms* of its acquisition; and that the officers are called upon in arriving at a determination as to whether the terms of acquisition have been complied with, to pass upon the competency, credibility, and weight to be given to the proofs. That in thus acting they exercise a judicial function binding upon the courts. Therefore, several things are necessary to be done and established by competent proof to the satisfaction of the land officers, besides the payment of the entry fee of ten dollars, before they will certify that the homestead claimant is entitled to a patent for the land.

A simple receipt for the entry fee and the compensation of the register and receiver, is issued when the entry is made, but this is not *payment* for the land. Something besides a money valuation is required under the Homestead law, and the policy of the Government. Actual continued settlement upon, and cultivation of the land for five years is exacted after entry, as a condition subsequent, which must be complied with. In case the homesteader tires of his residence on the land or for any other reason desires to leave it after six months and before the expiration of five years, he may commute his

entry for a pre-emption and pay the *minimum price* of the land and obtain the patent.

(*Sec.* 2201 *U. S. R. S.*)

The entry fee is not the minimum price, however, nor any part of it. Should the homesteader after entry, actually change his residence, or abandon the land for more than six months at any time, the land so entered will revert to the Government, upon proof of the fact to the satisfaction of the register and receiver of the land office.

(*Sec.* 2297 *U. S. R. S.*)

The term "revert" in this section has received an interpretation from Attorney General McVeigh, in connection with entry under the homestead law, which the District and Supreme Courts of Dakota followed in this case, which we are disposed to look upon as erroneous, and in direct opposition to the current decisions of the U. S. Circuit and District Courts on the effect of homestead entries.

THE PUBLIC DOMAIN!

DOES A PRE-EMPTION OR HOMESTEAD ENTRY CHANGE ITS CHARACTER?

Public land by its term, means the lands of the United States that have not been reserved for some special purpose by law or Presidential proclamation, and which have not been segregated by sale and purchase. Neither pre-emption settlement or homestead entry effects segregation until the minimum price of the land is received in the one case, and final proof is made in the other. This court held in the case of *Simmons vs. Wagner* 101 *U. S.* 260, that

"It was well settled that when lands have once been sold by the United States and the purchase money paid,

the lands sold are segregated from the public domain, and are no longer subject to entry." And, at p. 262,

"After the certificate issued, the lands were no longer, in law, a part of the public domain."

The public lands of the United States do not cease to be public lands, because Congress has authorized certain person to settle upon, occupy, cultivate and improve them under the pre-emption, homestead or other benificent land laws. These laws give the occupant under them, a preference right to become the owner, after he has complied with all the conditions imposed by them in each of the methods permitted, but not before.

See the case of Frisbie vs. Whitney 9 Wall. at p. 194, 195, and 196 citing the opinions of Attorneys General Cushing, Bates and Speed, and declaring them sound; and the Yosemite Valley Case 15 Wall. 77.

In the case of the United States vs. Stores (14 *Federal Rep.* 824) decided in the United States Circuit Court, S. D. Florida, the defendant, had been indicted for cutting timber on the public lands. On the trial in November, 1882, of that case the court held:

"A *homestead entry*, although it gives the party entering certain rights of occupation, does not so convey title or divest the United States of property in it, as to change its character in this respect; and it is immaterial therefore, whether the land has been *entered* for homestead by a third party or not."

The jury found a verdict of guilty.

In the case of the United States vs. Lane, (19 *Fed. Rep.* 910) decided in the U. S. Cir. Court E. D. Wisconsin in December, 1883, the action was replevin to recover a quantity of timber by the government, claimed to have been illegally cut from land which the defendant had *entered* as a homestead, in March, 1882, and was then in the occupancy of, and the court held:

"In clearing for cultivation, should there be a surplus of timber over what is needed for purposes of improvement, the claimant may lawfully sell or dispose of such surplus; but it is not lawful for him to strip the lands of its timber for the sole purpose of sale and speculation, until he has made *final* proof and acquired the *title*."

Verdict for the government.

In the case of the United States vs. Freyberg and others (32 *Fed. Rep.* 195) to recover the value of timber cut by the defendants upon the homestead entry of one Klingenberg with his consent, and for which he received from them a pecuniary consideration, a part of which was used in improving the land occupied, decided in the U. S. Cir. Court, E. D. Wisconsin, in December, 1886, the homestead claimant—after suit brought and before trial, commuted his entry and made cash payment for the land under Section 2301 U. S. R. Stat: The court held:

That the government could not recover, as the *status* of the homestead entry had been *changed;* that the commutation made a completed purchase and payment of the land, and Klingenberg had become the equitable owner of it, and was entitled to receive from the government the legal title; and that by reason of this payment he and his vendees were protected from liability in the action."

The court, in its opinion, repeats what was laid down as the law, in United States *vs.* Stores, that "a *homestead entry* was not a *title,* so as to divest the United States of its property in the land."

In the case of the United States vs. Murphy (32 Fed. Rep. at p. 385) which was a criminal prosecution against the defendant for cutting and removing timber from the public land, that is, from the homestead entry of one Henderson, who had undertaken to sell him the timber, the U. S. Cir. Court W. D. Mich. N. D. held:

"The law *reserves* the title in the government until the homesteader proves up his claim, and his patent issues."

The defendant was convicted, and a new trial refused.

In the case of the United States vs. Taylor (35 Fed. Rep. 484) the U. S. Cir. Court, S. D. Alabama, in June, 1888, in an action which had been brought against the defendant for tresspass on the public lands in 1884 and 1885, in cutting timber and removing crude turpentine from his homestead claim, held as the law, in its charge to the jury:

"That the right of the homesteader on the land was one of *occupancy only*, with certain rights and privileges incident to his occupation, subject to the right and duty of the government to preserve and protect the timber on the land; that the United States have such possession as entitles them to maintain the action."

It was also held, that the *receipts* of entry of the receiver of the land office that the land had been *entered* as a homestead, were not sufficient evidence that the government had been divested of its *title* and that the homestead claimant was *vested* with it: That until final proof was made, and the issue of the *certificate* of the register and receiver, the homestead claimant was not entitled to a patent; and therefore, the cutting of timber and removing crude turpentine by the defendant, if proved as alleged, made him guilty of trespass and liable in damages. It was also held by the court in this case, that possession by the homestead claimant and a receiver's receipt of the payment of the entry fee, issued since the commencement of the action, did not divest the government of possession or *title*, so as to prevent it from maintaining the action.

But we have seen that a commutation entry and

purchase, had that effect, in United States vs. Freyberg and others, 32 Fed. Rep. cited before.

The judicial views advanced by the above courts, in construing the effect of a homestead entry, are not in accord with that of Attorney General McVeigh, and the view of the Supreme Court of Dakota in this case.

THE VIEW OF THE SAME QUESTION

IN STATE AND TERRITORIAL COURTS.

The Supreme Court of Colorado recently held, in the case of *Hammond vs. Rose*, decided in October, 1888, (19 Pacific Rep. 466), that one who has made an appropriation of the waters of a stream for irrigation acquires a prior right thereto, as against a riparian owner who obtained a patent from the United States, *after* such appropriation, and before the act of Congress of July 9th, 1870, amending the act of July 29, 1866, providing that patents thereafter issued shall be subject to any vested and accrued water rights.

The case seems to be in accord with *Broder vs. Natoma Water Co.*, as to pre-existent rights to the use of water on public lands.

HOMESTEAD ENTRY NOT TAXABLE IN IOWA.

The Supreme Court of this state in the case of *Moriarity vs. Boone County* (39, *Iowa* 634,) where the plaintiff made a homestead entry on the 15th day of July, 1863, and four years afterwards the land was sold for taxes assessed against it in 1864 and 1866. Held:

"That the *entry* did not divest the United States of the *title* until five years from the date of filing the declaratory statement; and that prior to that time the land was not subject to taxation."

IN MICHIGAN, in the case of *Flint & Pere Marquette Railway Co. vs. Gordon* 41 *Mich.* 420. Opinion by Cooley, J.: Decided in 1879.

The defendant made a homestead entry on land belonging to the United States in 1868, in Osceola County, Michigan, and made final proof, and received the patent in 1874. The complainant laid out its line and constructed its railroad over it in 1872. The defendant protested against the action of complainant in crossing his land with its railroad, and in 1875 brought his action. During its pendency the complainant filed a bill, to quiet its title to the right of way across the land, claimed and occupied for railway purposes. This claim was based on Section 2477 of the U. S. Rev. Stat., which was originally Section 8 of the Act of Congress passed July 26, 1866, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," and is as follows:

"That the right of way for the construction of highways over the public lands, not reserved for public use, is hereby granted." Held in that case that

"The homestead *entry* vested no *title* in the defendant, but it gave him under the law a right of possession, which he might perfect by continued occupation and improvement. If he failed so to perfect it, what *right* he had, *reverted* to the United States. If he perfected it, he was entitled to a patent which related back to the time when his entry was made, and took date with it. *French vs. Spencer* 21 *How.* 228; *Shepley vs. Cowan* 91 *U. S.* 337; *Johnson vs. Ballou* 28 *Mich.* 379. This is a statement of familiar and undisputed principles." The court further said:

"But in this case there is what at first blush seems to be a conflict of grants. The defendant made his entry first, but the complainant completed its road over the land before the defendant obtained his patent. To ac-

quire the benefit of the Act of 1866, nothing more was necessary than for the road to be constructed: No patent is required in such cases; but, the offer and the acceptance taken together are equivalent to a grant. The complainant, therefore, by accepting the offer of the government, obtained a grant of the *right of way*, which was at least perfectly good against the government, and must be held perfectly good as against the defendant unless his patent antedates it by relation, or unless the equities springing from possession and improvement would preclude any right being acquired adversely."

In Osgood vs. El Dorado Water Co. (56 Cal. 571) decided by the Supreme Court of California in 1880, the facts were about these: The public surveys were extended to the land in question in El Dorado Co. State of California, in 1865, on which the plaintiff was at the time residing. He made a pre-emption filing on a 160 acre tract, near the outlet of Echo lake, and the stream flowed through his claim the entire length, and then fell into Truckee river. He proved up and paid for the the land at the proper land office, in June, 1870; and the patent subsequently issued to him October 25th 1871.

About March, 1867, the immediate grantors of the defendant, attempted to make a location of the water right on the bank of the lake, by posting the usual notice declaring their purpose to erect a dam at the outlet and divert a portion of the water by means of a flume, ditch or canal, and carry the same to certain mining and agricultural districts for use there.

Work progressed each year from 1867 on a main canal, of which Echo lake was intended to be one of the feeders, and in the spring of 1872 a new notice was posted by the defendant's grantors at the outlet of the lake, and work commenced on the dam and ditch to divert its waters. This work was continued until the ditch was completed in 1876 by the defendant, which

had become the owner by purchase, in 1872, and it commenced to use the water.

In August, 1876, the plaintiff brought this action to restrain the diversion of the water claiming that he was the owner in fee of the pre-empted land and the riparian proprietor, and as such, entitled to the uninterrupted and undiminished flow of the water of the lake through it, in its natural course. The doctrine of relation was invoked to give effect to plaintiff's patent as of the date of the filing of his declaratory statement in the land office, June 11, 1868.

"For obvious reasons" say the Supreme Court at p. 578, "no case was made for the application of that doctrine," (citing Megerle vs. Ash 33 Cal.; Daniels vs. Lansdale 43 Id.; Smith vs. Ahern 34 Id.; Lansdale vs. Daniels 10 Otto (U. S.) "The plaintiff's rights must be held therefore, to have attached on the 25th day of October, 1871, the date of the issuance of the patent."

The Court then cites the acts of Congress of July 26th, 1866, and of July 9th, 1870, relating to water rights and right of way for ditches etc., over the public lands; quotes the decision of this court in Broder vs. Natoma Water Co., as the guiding authority, and adds:

"This water belonged to the government of the United States, and was, by the local customs, laws and decisions of the courts subject to appropriation for the purposes for which defendant's grantors sought to appropriate it. * * * *

"The defendant's grantors therefore, had the right to appropriate the water in controversy, and if they acquired a vested right therein, *prior* to the issuance of plaintiff's patent, the plaintiff's rights by express statutory enactment, are *subject* to the rights of the defendant."

In the case of Farley vs. Spring Valley Mining and

Irrigating Co., (58 *Cal.* 142) decided by the Supreme Court of California in 1881, the facts were as follows:

The plaintiff settled as a pre-emptor on an eighty acre tract of public land in Butte county, in that state, and filed his declaratory statement in the proper land office, February 27th, 1871, and afterwards proved up on his claim and paid for the land in 1877; and, a patent was issued to him from the government January 23d, 1879.

The defendant constructed a reservoir on the public land and filled it after the plaintiff had filed his declaratory statement The plaintiff brought an action subsequently against the defendant to recover damages for alleged injury to his land, by flooding it, and for an injunction.

The District Court non-suited the plaintiff; and, on appeal the Supreme Court affirmed the judgment of the lower court, and said:

"The eighty acres claimed by plaintiff was public land of the United States until the plaintiff *proved* up his claim and *paid* for the land in 1877."

After citing the acts of Congress of 1866 and 1870 relative to water rights, rights of way for ditches, canals and reservoirs used in connection therewith on the public lands, and quoting Jamieson vs. Kirk (98 U. S) Broder vs. Natoma Water Co., and Osgood vs. El Dorado Water Co., the court further said:

"The plaintiff was not entitled to judgment against the defendant for damages under the proviso to the ninth section of the act of July 26, 1866. In the construction of its reservoir the defendant did not injure or damage, or in any way invade the possession of the plaintiff."

In a recent case, *Tenem Ditch Co. vs. Thorpe*, decided

January 20, 1889, in the Supreme Court of the Territory of Washington (20 Pacific Rep. 588) the facts, briefly stated, were:

A number of settlers residing along the banks of Tenem Creek, Yakima County, in 1873, on unsurveyed government lands formed a ditch, claiming two-thirds of the waters of the creek for the use of themselves and other settlers for agricultural purposes. A settler below named Thorpe objected to the diversion and to the digging of the ditch on the line of the survey across his claim.

The land was surveyed in 1873; and in 1874 Thorpe made a homestea entry on his claim; and continuing work the company completed its ditch in 1875. Thorpe claimed that by virtue of his settlement upon the unsurveyed lands with intent to take them as a homestead, the inchoate and equitable title was vested

in him to that land, and, as an incident thereto, the natural flow of the stream over it; and thereupon Thorpe dug another ditch tapping the creek above the mouth (head?) of the plaintiff's ditch, whereby he drew off nearly, if not all, of the water of the creek, diverting it from the plaintiff's ditch; whereupon the plaintiff brought its action for an injunction and damages. The District Court adjudged the Ditch Co. entitled to two-thirds of the water and Thorpe and another to the remaining third.

From the decision Thorpe and the other party appealed to the Supreme Court of the Territory, where the decision of the District Court was affirmed:

The Supreme Court say:

"It is the opinion of the court that the prior appropriation of the flow of any water over the public lands of the United States has a vested right therein; that so far as the right of appropriation exists, it exists by virtue

of the laws of the United States and the proprietorship of the United States; that the local custom itself forms a law which is recognized by the United States as giving the right to the first appropriator, and, that, so long as these laws of the United States control the public lands, this right of prior appropriation exists as the law of the land: that when the United States loses control over the land, and the control thereof is left to the states or territories, then the right of prior appropriation, under the laws of the United States, ceases, and not till then. This rule would cause the right of appropriation to exist as against Thorpe and Hale *until* they obtained *a title* to the land and a *vested right* from the United States, which could be held independent of the proprietorship of the United States. In other words it (plaintiff's rights) existed until the United States has made primary disposal of the soil. The Government of the United States never made primary disposal of the soil to Thorpe and Hale until long after the appropriation of the water by the ditch company. The government of the United States cannot be said to have disposed of land under the pre-emption law until final proof and payment, and not under the homestead law until final proof of the homesteader, which entitles him to a patent."

In Ellis et al. vs. Pomeroy Improvement Co. (21 Pac. Rep. 27) a still later case decided at January Term 1889, by the Supreme Court of Washington Territory, the facts were:

The plaintiff Ellis filed a declaratory statement on a pre-emption claim in Garfield County, in that territory, on May 28, 1878. Pataha Creek ran through a part of the claim. He and two others at the same time formed a company, built a ditch across the land to convey the water of the creek to a place called Pomeroy, to operate a planing mill. In August following they sold the mill to one Day from whom the defendant company derived its title; and this company was using the

water and ditch in connection with this mill, at the beginning of this suit.

Ellis made his final proof and entry of the land April 30, 1880, and the patent issued to him November 10, 1882. He and wife commenced this action in September, 1887, alleging that they were the riparian proprietors, that the patent took effect, by relation, as of the date of the declaratory statement of Ellis; and, prayed for an injunction to restrain the defendant from diverting the waters from the channel of the creek. The District Court decreed in favor of the defendant; and, on appeal by the plaintiffs, the Supreme Court of the Territory affirmed the decree.

In their opinion the Court say:

"The patent issued to Ellis and on which he relies, excepts under the Act of Congress of 1866 "water rights, ditches, and rights of way for such, vested or recognized by local customs, laws," etc. Appellee's rights were vested in 1879, by the unquestioned appropriation of this water, the building of the mill, ditch, dam, etc. These rights were fully recognized by the local customs which existed at that time, of taking water over the public lands, as here. The exception in the patent of Ellis recognizes this. The rights of Appellee being recognized by custom, were excepted from the patent; and the appropriation of the water by Appellee's grantors simultaneously with Ellis' filing on the land; for the company (Ellis, Ritter and Steen) had quite as much right through recognized custom, to take the water as had Ellis to take the land. These two being, as stated, exercised together, the company could acquire as complete right to the water as Ellis did to the land.

But in fact, Ellis had no vested right which he could assert against the company's water right, prior to April 30th, 1880—that being the time when he made final proof, while they acquired a vested right prior to

this (spring of 1878) by exercising an actual appropriation of this water. A mere entry on the public lands gives no *vested* rights against the government until *final proof.* It makes a *prior* right of pre-emption, and establishes a privilege as against other claimants [to the land] subject until final proof etc., to the absolute dispossessing power of Congress. 9 U. S. St. p. 195. Land thus *occupied* is subject to the acquisition of prior water rights, under local customs and appropriations. It would also be subject to such acquisition up to the time of *final proof,* when, and only when such privilege becomes a vested right. It is, up to such time, therefore, *subject* to water rights being acquired thereon by others, unless such settler or pre-emptor promptly exercises his water right and makes his appropriation

While therefore, Ellis, at the time of filing, might have also appropriated the water, and thus acquired water rights by taking steps sufficient to assert his claim to these (if no prior appropriation had occurred) the mere taking up of the land did not itself work a prior appropriation, nor indicate any purpose so to do; but his not doing so, on the contray, left such right subject to appropriation, until he made final proof, and thereby acquired a vested right, by anyone who complied with the law or local custom in an appropriation of such water right. Appropriation, as herein used, may be defined as the intent to take, accompanied by some open, physical demonstration of such intent, and for some valuable use. It is proper to add that such intent or demonstration must be followed up with reasonable diligence, and consummated without unnecessary delay." p. 29.

The law of this last case was affirmed by the same court, in March, 1889, in the case of Geddes vs Parish 21 Pac. Rep. 314.

These decisions leave little to be said, we think, in in support of our contention that the questions

propounded by us on the page of this brief should be answered in the negative.

Is THE SITUATION of the homestead claimant on the public lands after entry, different, in regard to riparian rights, from that of the pre-emption claimant? Appellant's counsel think not! The order of payment of money, is reversed; and a lesser sum is required for a homestead than for a pre-emption entry; but, longer service is exacted on the land. Five years actual settlement and cultivation must follow the small money payment in the case of a homestead, while usually twelve months settlement and improvement in pre-emption cases was all that was required. Payment of the prescribed amount of money alone, was, and is not sufficient in either case, to make the claimant the equitable or legal owner of the land. Other conditions were and are imposed by law. In pre-emptions they preceded, and in homesteads follow the entry. In either case the land officers must pass upon the proofs, that the conditions have all been performed before the pre-emption or homestead can be allowed; and this *allowance* can only be made after the expiration of the required term of settlement and cultivation.

It may not be amiss in this connection to call attention to the fact that the pre-emptioner was required to pay to the United States "the minimum *price* of such land:" while the homestead entry of ten dollars, is not stated to be the price of the land. Neither is it stated to be the basis of the patent; but the certificate issued by the register and receiver after final proof, is. (*Sec.* 2238 *subd.* 4 *U. S. R. S.*)

THE TERM "ENTRY"

as used in the land laws, and applied to the public land, received judicial construction in 1866, in the Supreme Court of California in the case of People vs. Shearer, (30 Cal. at p. 648.) In 1864 Congress extended the provisions of the pre-emption law to the "Rancho

Bolsa de Tomates" tract in Marvin County, California; and, disputes arose over its construction in the courts. One of the questions before the Supreme Court was, whether or not the claims of the occupants on this land, were taxable after *entry* and before the patents issued. The court held that they were, and gave its definition of what an *entry* was, in that cause, as follows:

"The payment, receipt of *the purchase money*, and the issuing of a receipt and certificate of entry therefor, constitute an *entry* of the land."

The Court say in the same case at page 650,

"A mere right of pre-emption is not a *title*. It is only a profer to a certain class of persons, that they may become purchasers if they will. Without payment or an offer of payment, it confers no equity. It is only regarded as conferring an equity, when the party has consented to accept the offer, by payment, or by claiming the benefit of the law in a proper manner, within the required time."

The Court cites the opinion of Attorney General Speed of date May 26th, 1866, approvingly, wherein he advances his view of an *entry*, thus:

"Before proof and payment are made, the only right which a settler has, is an inchoate *right* of entry. When proof and payment are duly made his right of *entry* becomes choate, and he acquires a vested interest in the land."

Proof and payment were the last things for the pre-emption claimant to make. Payment of the entry fee is among the first acts to be done by the homestead claimant; and, proof of residence, cultivation and improvement cannot follow until five years thereafter. So, payment, proof, and allowance, are as necessary for him as proof and payment and allowance were for the

pre-emption claimant, in order that he may acquire a vested interest in the land.

The case of People vs. Shearer was followed in Hutton vs. Frisbie, 37 Cal. 491, W. P. R. R. Co. vs. Tevis, 41 Cal. 492, and Lowe vs. Hutchins, 41 Id. 634.

This court in 1869 in the case of Whitney vs. Frisbie (9 *Wall.* 187) and in the Yosemite Valley case in 1872 (15 *Wall.* 77) held:

"That the occupation and improvement on the public lands with a view to pre-emption, do not confer a vested right in the land so occupied;" and that "a vested right under the pre-emption law, is only obtained when the purchase money has been paid and the receipt of the proper land officer given therefor."

The same reasoning applied in the case of a homestead claimant, would logically lead to the conclusion, that he could only acquire a vested right in the land under the Homestead law, when final proof, and allowance was made and his Homestead Final Certificate was issued by the proper officer.

THE WATER RIGHT of the Appellant, we contend vested and accrued to him, in 1880, when he completed his ditch, and made a beneficial use of the water of Falsebottom creek in irrigating his crop and its use each year thereafter, until 1886, when the Appellee took unlawful possession of his water right and ditch, and prevented him from using the same, since.

THE CONTRARY VIEW

advanced by U. S. Attorney General McVeigh in 1881 (1 Copp's Pub. Land Laws 387, 388) finds support, in Red River and Lake of the Woods Railroad Co. vs. Sture, (20 *Northwestern Rep.* 229) in the Supreme Court

of Minnesota; and in Burlington K. & S. W. R. Co. vs. Johnson (16 Pac. Rep. 125) in the Supreme Court of Kansas. But the reasoning in these cases seems strained and stilted, and the construction given to the homestead law, dissipates the plain purpose of the later congressional legislation of 1866 and 1870, relative to water rights and ditches on the public land, and the exceptions to be incorporated into patents when homesteads are *allowed.* The section should have read "homesteads entered," if Congress intended that a mere homestead entry, would pass the title of the Government to the homesteader. No similar view has been taken by any United States court, that we are aware of.

There are certain enigmatical decisions like that of Crandall vs. Woods, 8 Cal. 136; Leigh Co. vs. Independent Ditch Co., Id. 323; and Van Sickle vs. Haynes, 7 Nev. 901, that went to the extent of holding that possession of the public land carries with it the privileges and incidents of ownership against every one but the government, subject only to rights antecedently acquired. The California cases have long ceased to be regarded as authority in that state, and the Nevada case was squarely overruled in Jones vs. Adams, 19 Nev. at p. 88.

THE DOCTRINE OF RELATION

has been invoked and was applied in this case by the courts of Dakota Territory, to the prejudice of the Appellant; and this also was error, we contend.

The doctrine is a fiction of law for the furtherance of justice, but is not admitted to the prejudice of third parties—not parties or privies—having any right. *Jackson Ex. Dem. Griswold vs. Bard,* 4 *Johnson Rep.* 230, 234; *Jackson vs. Bull* 1 *Johns. Cases* 85; *Heath vs Ross* 12 *Johns.* 140. *Tenem Ditch Co. vs. Thorpe,* 20 *Pac. Rep.* 588.

The doctrine of relation is only applied to subserve the ends of justice, and to protect parties deriving their interests from the *claimant*, pending the proceedings for the confirmation of his title. *Lynch vs. Bernal* 9 *Wall.* 315.

It is thus stated by this court in the case of *Gibson vs. Chouteau* 13 *Wall. at p.* 101:

"The doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice, and is solely applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land, and acquired the equitable claim or right to the title."

The application of the doctrine was denied in the two United States cases above; and in the case of *Flint & Pere Marquette R'y Co. vs. Gordon*, by the Sup. Court of Michigan, in the attempt to defeat the "right of way" located by the railway company on a homestead after entry and before final proof. It was also denied by the Supreme Court of California in the case of *Megerle vs. Ash*, 33 *Cal.* 74; *Smith vs. Athern*, 34 *Id.* 506; *Daniels vs. Lagsdale*, 43 *Id.* 41; and in the latter case on appeal to this court, (100 *U. S.* 113,) where the claimants were asserting their alleged rights under different proceedings allowed by the United States laws to acquire title to lands. It was invoked in the case of Ellis et al. vs. Pomeroy Imp. Co., already cited in this brief, in the Supreme Court of Washington Territory and denied because it had no application to the facts of the case.

To acquire water rights or right of way on the public land for a ditch is a separate and distinct right, from acquiring the title to the land; and each is initiated by its own peculiar proceedings, and without reference to the other. The patent that finally issues to the land claimant does not purport to convey the stream, but *expressly* makes the grant of the land subject to *vested* and

accrued water rights etc. which exist at the date of the grant. The intention to protect such rights to the owner, is, as clear as the grant of the land to the patentee. The former does not, and is not required to purchase this right from the government, and the fee subsequently conveyed to the land is made subject to such existing water rights as may be recognized and acknowledged by the local laws, customs or decisions of the courts. Hence the doctrine of relation cannot apply, as the two grants are from the same paramount source, and are made separate and distinct property rights by Congress.

Surely, Congress has power to make the incident to land—a flowing stream for instance, the subject of private property, to be acquired and the right thereto vested in the prior appropriator, as much so, as the land itself. It has seen fit to make the possession of that part of the public lands which is valuable for minerals separarable from the fee, and to provide for the existence of an exclusive right to the possession, while the paramount title to the land remains in the United States. (*Belk vs. Meagher*, 104 *U. S.* 283.) And this court has declared in the case of Forbes vs. Gracey, 94 U. S. at p. 766 and 767 that his right of possession of such part of the public lands, valuable for mineral, as Congress concedes, "is property in the miner, and property of great value." And "may be sold, transferred, mortgaged and inherited without infringing the title of the United States."

It can impress upon the public lands of the United States a right of user of its waters for beneficial uses, to him who first appropriates and make a beneficial use of them; and grant a right of way to him for ditches and canals used in connection therewith, over them; and make all subsequent sales, grants, or bounteous gifts, subject to such grant of the prior user of water, and right of way etc', and the "fiction of law" called relation will not affect them.

RECOGNIZED BY THE LOCAL CUSTOM.

The local custom existing since the early settlement of the country, and which was existing when this action was brought, in the locality where the respective homestead of the Appellant and respondent's grantor, are situated, recognized and acknowledged the right to locate water rights, to appropriate and use the water of flowing streams, by means of ditches and canals, for the purpose of irrigating growing crops; and without such irrigation crops were usually failures in ordinary seasons. These are admitted facts in this case. What is the effect of these admissions? Do they not eliminate the riparian question from the controversy, and bring the "local custom" to the front, which acknowledged and recognized the right to locate water rights, to appropriate and use the water of flowing streams for the purpose of irrigation by means of ditches etc., and the irrigation was usually necessary. The existence of such a custom since the early settlement of the country, was incompatible with the doctrine of riparian rights. If the former existed, the latter could not: That is to say, they could no more exist in the same locality at the same time, than two material bodies could occupy the same space at the same time. But the custom existed and irrigation was usually necessary:—this is admitted by the parties, and is in the record. Nothing is stated or admitted as facts, relative to riparian rights, in the record.

In the case of *Sharp vs. Hofman* (21 Pac. Rep. 846) recently decided by the Supreme Court of California (May 31, 1889), the controversy was about an alleged wrongful diversion of water. Both plaintiff and defendants were riparian proprietors on Parker creek, in Lassen County, the lands of plaintiff lying below those of the defendant.

But, on the trial it was admitted and put in the record, that during the time, that both parties claimed their respective rights to the water were acquired, "irriga-

tion in the neighborhood of the farms of plaintiff and defendant was necessary, and that it was the general custom of the farmers in such neighborhood, to divert, by means of dams and ditches, the waters of streams to irrigate their farms."

The Supreme Court held that this admission eliminated the question of riparian proprietorship from the controversy.

NO COMMON LAW IN DAKOTA.

So far as its power to do so extended, the Legislative assembly of Dakota Territory, declared in February, 1877, in its codes still in force.

"CODES EXCLUDE COMMON LAW.] In this territory there is no common law in any case where the law is declared by the codes." (*Civil Code of Dakota Sec.* 6, *p.* 233.)

If there was, it could in no way interfere with the primary disposal of the soil by the Government. Hence any statute of the territory declaring and defining what are known as riparian rights cannot affect public land, whatever effect it may have on private lands.

PRIOR APPROPRIATION OF WATER

RECOGNIZED BY LOCAL LAW.

The Civil Codes of Dakota passed and approved February 17, 1877, recognized and acknowledged acquired rights by prior appropriation and use, and rights of way for ditches, canals, etc., and we here quote all the sections relating thereto in force, prior to March 10, 1883.

"All mining claims now located, or which may be hereafter located, shall be subject to right of way of any

ditch or flume for mining purposes, or of any tramway or pack trail now in use, or which may hereafter be laid out across any such location: *Provided always,* That such right of way shall not be exercised against any location duly made and recorded and not abandoned prior to the establishment of the ditch, flume, tramway or pack trail without the consent of the owners, except by condemnation, as in case of land taken for public highways, parol consent to the location of any such easement accompanied by the completion of the same over the claim, shall be sufficient without writing: *And provided further,* That the ditch or flume shall be so constructed that the water from such ditch or flume shall not injure vested rights by flooding or otherwise." (*Chap.* 31 *Sec.* 11 *on Mines and Mining.*)

"A corporation is a creature of the law, having certain powers and duties of a natural person." (*Civil Code Dak. Section* 373.)

Private corporations can be formed by the voluntary association of any three or more persons * * for mining, manufacturing and other industrial pursuits, or the construction or operating of * * * irrigating ditches * * * for such other purpose as Congress may hereafter authorize (Referring to Sec. 1889 U. S. Rev. St.) *Civil Code Dak. Sec.* 384.

Any ditch corporation shall have the right of way over the line named in the article (of incorporation) and shall also have the right to run the water of the stream or streams named in the articles, through their ditch; *Provided,* That the line proposed shall not interfere with any other ditch whose rights are prior to those granted under this article, and acquired by virtue of such articles of incorporation. Nor shall the water of any stream be diverted from its original channel to the detriment of any miners, millmen or others, along the line of said stream, who may have a *priority* of right; and there

shall be at all times left sufficient water in said stream for the use of miners and agriculturalists along said stream." (*Civil Code Dak. Sec.* 320.)

"Every ditch corporation must furnish water to the class of persons using water in the way and for the purposes for which the articles of incorporation declare the water obtained for the incorporation is to be used, whether miners, manufacturers, mill men or farmers, whenever they shall have water in their ditch unsold, and must at all times give preference to the use of the water in such ditch to the class of persons so named in the articles; and the rates or tolls at which water is to be furnished must be fixed by the board of county commissioners as soon as the ditch shall be completed and prepared to furnish water."

(*Id. Sec.* 521.)

All of which shows that by the general legislation of 1877 of Dakota, that vested and accrued water rights for irrigation, and the right of way for ditches to convey the same was recognized and acknowledged, *and regulated* by law.

These provisions were amended somewhat, and made more certain by the act of the Dakota Legislature in February, 1881, entitled

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"WATER RIGHTS."

CHAPTER 142, AN ACT RELATING TO WATER RIGHTS.

Be it enacted by the legislative assembly of the Territory of Dakota:

§ 1: PARTY HOLDING LAND SHALL HAVE RIGHT TO WATER.] That any person or persons, corporation or company, who may have or hold a title, or possessory right or title to any mineral or agricultural lands within

the limits of this Territory, shall be entitled to the usual enjoyment of the waters of the streams or creeks in said Territory for mining, milling, agricultural or domestic purposes; *Provided:* That the right to such use shall not interfere with any prior right or claim to such waters, when the law has been complied with in doing the necessary work.

§ 2: MAY CONDUCT WATER FROM REMOTE STREAM.] That when any person or persons, corporation or company, owning or holding land as provided in section 1 of this act, shall have no available water facilities upon the same, or whenever such lands are too far removed from any stream or creek to so use the waters thereof, as aforesaid, such person or persons, corporation or company shall have the right of way through and over any tract or piece of land for the purpose of conducting and conveying said water by means of ditches, dykes, flumes or canals, for the purpose aforesaid.

§ 3: RIGHT OF WAY LIMITED.] That such right to dig and construct such ditches, dykes, flumes and canals over and across the lands of another shall only extend to so much digging, cutting or excavation as may be necessary for the purposes required.

§ 4: CONTROVERSIES—HOW DETERMINED.] That in all controveries respecting rights to water, under the provisions of this act, the same shall be determined by the date of appropriation as respectively made by the parties, whether for mining, milling, agricultural or domestic purposes.

§ 5: DETERIORATION OR DIMINUTION NOT TO BE CONSIDERED.] That the waters of the streams or creeks of the Territory may be made available to the full extent of the capacity thereof, for mining, milling, agricultural or domestic purposes, without regard to deterioration in quality or diminution in quality, so that the same do not materially affect or impair the rights of the prior appropriator.

§ 6: Penalty for damaging lands.] That any person or persons, corporation or company damaging or injuring the lands or possessions of another by reason of cutting or digging ditches or canals, or erecting flumes, as provided by section 2 of this act, the party so committing such injury or damage shall be liable to the party so injured for the actual damage occasioned thereby.

§ 7: Abandoned water right. Bridging ditches, &c.] That this act shall not be so construed as to impair or in any way or manner interfere with the rights of parties to the use of the waters of such streams or creeks acquired before the passage of this act; *Provided:* That all water rights of ditches that have not been used or worked upon for one year next prior to the passage of this act shall be deemed abandoned and forfeited and subject to appropriation anew. That any person or persons, corporation or company, who may dig any ditch or canal, dyke or flume over or across any public road, trail or highway, or who use the waters of such ditch, dyke, flume or canal shall be required to bridge the same and keep the same in good repair at such crossing or other places where the water from any such ditch, dykes, flumes or canals may flow over or in anywise injure any road, trail or highway, either by bridges or otherwise.

§ 8: Penalty for failure to comply with provisions of section 7.] That any person or persons, corporation or company offending against section 7 of this act, on conviction thereof, shall forfeit and pay for every such offense, a penalty of not less than twenty-five dollars, nor more than one hundred dollars, to be recovered with costs in suit in civil action, in the name of the Territory of Dakota, before any court having jurisdiction. One half of the fine so collected shall be paid into the county treasury for the benefit of the common schools of the county in which the offense was committed, and the other half shall be paid to the person or persons informing the nearest magistrate that such offense has been committed. All such fines and costs shall be collected

without stay of execution and such defendant or defendants may, by order of the court be confined in the county jail until such fine and costs have been paid.

§ 9: MANNER OF LOCATING WATER RIGHTS.] That any person or persons, corporation or company appropriating the waters of any streams or creeks in this Territory, shall turn the water from the channel of such creek or stream, and construct at least twenty feet of ditch or flume within thirty days from the date of appropriation and turn the water therein, and construct at least twenty rods of said ditch or flume, if needed, within six months from the date of such appropriation, and turn the water therein; and within twenty days from the date of location the locator or locators of such water right shall file a location certificate thereof with the register of deeds of the proper county within which such water right is situated. A copy of such certificate shall be posted at or near the head of such ditch, flume or canal and shall contain the name or names of the locators, the date of location, number of inches of water claimed or appropriated and the purpose of the appropriation; and in no case shall the number of inches of water claimed exceed the conveying capacity of the first twenty feet of the flume or ditch, nor shall said ditch or flume be enlarged to the prejudice or injury of a subsequent appropriator, before such enlargement.

§ 10: WHEN ABANDONED.] A failure to commence the construction of such ditch or flume for sixty days after location, and prosecute such ditch, canal or flume to a final completion, without unnecessary delay, such appropriation shall be deemed abandoned.

§ 11: This act shall take effect and be in force from and after its passage and approval."

This will be sufficient to show that rights to the use of waters of flowing streams on the public lands by prior appropriation and user was and is recognized and

acknowledged by the local custom, and laws of Dakota Territory. True, there are some provisions of the Civil Code which are declaratory of the common law doctrine of riparian rights, but they can have no application to the case at bar, if we are right in our contention that homestead entries do not change the *status* of the land from public, until after final proofs, because the terrritorial legislature by its own enactment, (Sections 168, and 217 Civil Code Dak.) as well as by section 1851 of the U. S. R. Stat. is prohibited from passing any law interfering with the primary disposal of the soil. Sections 168 and 217 referred to, are as follows:

"The legislative assembly can pass no law interfering with the primary disposal of the soil. All property in this territory has an owner whether that owner is the United States, or the Territory and the property public; or the owner an individual and the property private. The Territory may also hold property as a private proprietor."

"Real property within this Territory is governed by the law of this Territory, *except* where the title is in the United States."

One quotation from the decision of this court in the case of Basey vs. Gallagher, and we then submit this case, feeling that it is quite clear that the District and Supreme Court of the Territory took an erroneous view of the law and the public policy of the government, in relation to acquiring vested water rights on the public land.

"It is very evident that Congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the *use* of water which had grown up among the occupants of the public land under the peculiar necessities of their condition; and that the law may be *shown* by evidence of the local customs, or by the legislation of the state or Territory, or by

the decisions of the courts. The union of the three conditions in any particular case, is not essential to the perfection of the right by priority; and in case of conflict between a local custom and a statutory regulation, the latter, as of superiority, must necessarily control." (20 Wall. at pp. 683, 684.)

We respectfully submit the case, and ask for a reversal of the decree.

DANIEL McLAUGHLIN,
WILLIAM R. STEELE,
Attorneys for Appellant.

Supreme Court, U. S.
FILED.
NOV 12 1889
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT,

OF THE UNITED STATES.

Appeal from the Supreme Court of the Territory of Dakota.

OCTOBER TERM, 1889.

DANIEL STURR, Appellant,
vs
CHARLES W. BECK, Respondent.

BRIEF AND ARGUMENT IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS APPEAL FOR WANT OF JURISDICTION, AND TO AFFIRM THE JUDGMENT: AND OPPOSING AFFIDAVITS.

DANIEL McLAUGHLIN, and
WILLIAM R. STEELE,
Counsel for Appellant.
WILLIAM L. McLAUGHLIN
Attorney for Appellant in Opposition to Motion to Dismiss.

Deadwood Daily Pioneer Print.

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The respondent has made a motion to dismiss the appeal in this Court, for the alleged want of jurisdiction; and that it is manifest that the appeal was taken for delay: and that the question on which

the jurisdiction depends is so frivolous as not to need further argument.

Counsel for respondent do not seem certain of their position, judging from the tenor of the motion. They ask for the dismissal of the appeal on the record herein and on five certain affidavits presented with the motion, and in the same breath—so to speak—say that "although the record *may show* that this Court has jurisdiction, yet it is manifest that the appeal was taken for delay only."

Wherein it is *manifest that the appeal was taken for delay only*, the Court, nor appellant's counsel, is not informed; but the record discloses no delay, and the affidavit of Daniel Sturr shows that he has not desired or asked for a moment's delay in this Court or the other's through which it has passed. He is necessarily, the party desiring a speedy but not a hasty consideration of the questions involved. The questions are important ones, as he views it; and, involve fairly the two questions which are honestly propounded to this Court in the main brief in this case, on behalf of the appellant, and in which he is deeply interested. They are as follows:

1—"Does a homestead settler on the public lands become the riparian proprietor, by virtue of a homestead entry, prior to his making final proof? And

2—"Does a homestead entry change the character of the land from public to private, before final proof and the issue of the certificate to the homesteader?

The District and Supreme Courts of Dakota have answered in the affirmative; and appellant believing that they are in error, the questions have been brought here for final determination.

By stipulation between the attorneys for the respective parties the case, necessarily involving the rightful construction of Sections 2339 and 2340 of the U. S. Revised Statutes, was agreed to be submitted to

this Court on printed arguments and briefs at this term. This stipulation is on file, here, and signed by them.

For some reason *not manifest* on the record, the attorneys for the respondent seek now to evade a direct determination by this Court, of the questions involved, and have moved to have the case dismissed for want of jurisdiction—basing the motion to dismiss upon the affidavits of four other persons besides that of the respondent relating to the value of the matter in dispute; and which seek to show that it does not exceed the sum of five thousand dollars, that is, has no value.

In our opinion the record does show on inspection, that the value of the matter in dispute exceeds $5,000, and that it is apparent that the Court has jurisdiction of the case. (See printed record pp. 27 and 28 affidavit of Daniel Sturr and Frederick W. White).

This record is assailed by the affidavits of five persons, and we have made an effort to meet the assault, by opposing to them the affidavits of eight competent persons, together with that of the appellant.

It also seems to us that the Court has jurisdiction of this case under the second section of the Judiciary Act passed by congress and approved March 3, 1885; as well as under the first section. The appellant sought in 1880 to acquire a vested right on the public land to the use of three hundred inches and upwards, miners' measurement, of the waters of Falsebottom Creek, Lawrence County, Dakota, for the purposes of irrigation, on his ranch, under the provisions of section 2339 and 2340, Revised Statutes of the United States, by doing all that the general and local laws and the customs required, and for six years no man his right did dispute, to use the quantity of water which he had thus appropriated. Were not his acts in that regard an authority exercised under the United States?

The testimony of a witness may be taken in three

ways:—By affidavit, by deposition, and by oral examination. The witness must know the facts to which he testifies whichever mode may be resorted to for the purpose of eliciting his testimony. When his opinion is material and relevant and is desired, it is proper to first show his competency to speak on the subject under consideration. If his competency is not shown his testimony ought to have little weight. Hence, if the affidavits on which this motion is grounded or any of them do not disclose the competency of the witnesses to testify to the value of irrigation in the locality where Sturr and Beck's ranches are, and to the value of water rights and ditches used in connection with them for purposes of irrigation, they are of little value.

AFFIDAVITS ON BEHALF OF RESPONDENTS MOTION.

James H. Kearney testifies that he is 24 years of age, and has resided in the locality of the matter in dispute ten years, and knows it. The ditch of appellant has absolutely no value, he says, and the cost of constructing it would not amount to one hundred dollars. He does not show that he ever constructed a rod of ditch anywhere, or ever had a ditch constructed; that he knows anything about the effects of irrigation on growing crops in that locality or elsewhere; or that he knows anything about the value of water rights and ditches for the purposes of irrigation on Falsebottom. Singularly enough, he cheerfully testifies that the ditch was taken out in 1877, three years before it had any existence.

It is not to be wondered at that this witness should testify that "this ditch and water right never had any value whatever and was only a damage to Beck's farm and no benefit to Sturr."

William O. Heake testifies to an acquaintance with Falsebottom Creek for five years last past and calls it a

wet weather stream whatever that is; that in his judgment the stream never had a supply of water for irrigation, and that Sturr's water right has no value and never had any, and that sixty dollars is the full value of the ditch. He does not detail a single fact to show his competency to testify—except his age.

Elham Smith's testimony is subject to similar criticism, and, measured by the rules of evidence, has no value.

John Dietschi says in his affidavit that he is familiar with the subject of irrigation, and with the value of ditches and water rights, knows the one in controversy, and that the same had no value in 1887 and has none now. He abstains from disclosing the grounds of his "familiarity with the subject of irrigation, and with the value of ditches and water rights." Possibly he may have believed himself to be a competent witness. But witnesses for the appellant (Odou and Sturr) testify that John Dietschi has no irrigating ditch or ditches on his land, and has never irrigated his crops since he settled in Falsebottom.

Charles W. Beck, the respondent, is the last witness, in his own behalf. He knows something about irrigation, for it is conceded that he forcibly took the appellant's ditch and water right in 1886, and has used the same to irrigate his land with ever since. He is fair enough to say that it "had very little estimable value in 1887—say $1,000, provided the water should run every season as it run that year," but that at the present time it has no value.

We submit that this is flimsy testimony to base this motion upon, and offer in opposition the following affidavits:

AFFIDAVIT OF ALBERT HENDERSON ON APPELLANT'S BEHALF.

TERRITORY OF DAKOTA, }
COUNTY OF LAWRENCE. } ss.

Albert Henderson being by me first duly sworn deposes and says: I am a farmer by occupation and am 42 years of age. I have farmed in Virginia, Arkansas, Kansas, Indian Territory and in Dakota. I settled on a farm in 1880 on Falsebottom, in this county and territory, and have resided there ever since. I own, or claim to own, 300 acres of land about two miles below the farm of Daniel Sturr, the appellant in this case. I cultivate about 140 acres of it, fully 100 acres of which are below the line of my ditch, which I use for the purposes of irrigation. I took out this ditch in 1881, claiming five hundred inches of the water of Falsebottom creek, and have used about 100 inches of the water each year since, for irrigating in the growing season. I only used a part of the water then flowing down the creek. From my experience for the past nine years—one year with the other, I can safely say that land in my locality, without irrigating facilities, will not produce and yield o e half as much crop as the same acreage below the ditch where irrigation is resorted to. I estimate my ditch and water right as worth to me at least $5,000 in value. Below me on the same stream are the water rights and ditches of A. J. Knight, Todd & Foglesong and Powers & Todd; and above Sturr's ditch there is that of Jack McKenzie's. I know them all, and am acquainted with their importance and value for the purposes for which they are used.

I know the ranches of Daniel Sturr and Charles W. Beck and the "Elm Tree Water Right and Ditch," now the subject of controversy in this action; and, from 8 or 9 years acquaintance with it, and my acquaintance with the value of ditches and water rights in that locality, I

place its reasonable value at least at $6,000. The water now runs in the creek between Sturr's ranch and mine.

ALBERT HENDERSON

Subscribed and sworn to before me this 1st day of November, A. D., 1889.

NORMAN T. MASON,
Notary Public.

[SEAL.]

AFFIDAVIT OF EMILE ODOU, ON APPELLANT'S BEHALF.

TERRITORY OF DAKOTA, } ss.
COUNTY OF LAWRENCE. }

Emile Odou, being first duly sworn, deposes and says: I am 37 years of age, a farmer by occupation, and reside on Falsebottom, in Lawrence County, Dakota Territory, and have resided there for the past thirteen years. I own three hundred and sixty acres of land, which adjoins the farm of Charles W. Beck, respondent in this case, and is one mile south of the farm owned by Daniel Sturr, the appellant. The middle fork of Falsebottom comes down from the south and runs through my farm, one mile, and then joins the main west fork of Falsebottom creek, on the ranch of said Beck, near the west line. A good portion of the land at the junction of those two forks, is embodied within the limits of my farm. I know the ranches of Daniel Sturr and of Charles W. Beck very well, for the past thirteen years, and am and have been familiar with the flow of water in both those Falsebottom forks during that time. There is a larger flow of water down the main Falsebottom creek, until a short distance above the junction and above the head of Elm Tree ditch, claimed by Daniel Sturr. I was there and examined the water, and the obstruction at and above the head of that ditch, this 31st day of October, 1889. Recent freshets in the past year or two have deposited considerable gravel and boulders

at the head of said ditch, which were left in a loose condition when the waters receded to their natural flow, and through which the water is now running, and it appears dry on the surface of the gravel, and the water comes to the surface again, a short distance below, and flows onward down the stream until it encounters another mass of gravel and boulders, deposited by floods. I consider these deposits as being only temporary and liable to be carried off by the next freshet, and deposited lower down, until they reach the Redwater river.

No effort has been made during the past year, to clear away the gravel, near the head of the Elm Tree ditch, or to clear out and extend the head of the ditch to where the water has been in full flow for the past thirteen years. I have two hundred acres under cultivation on my farm, one hundred acres of which is bottom land, near the junction of the two forks, and one hundred on the bench adjoining. My experience has been that the bench land, for the purposes of cultivation does not produce one half as much of the same kind of crop as the bottom land, which I attribute to the want of irrigation on the bench land and that the bottom land receives quite a degree of moisture, from the flowing water, down the creek, by the process of percolation through the soil. I have had some experience in Colorado in the matter of irrigating growing crops, by means of a ditch, bringing water on the fields, before I came to this part of Dakota, and I know its use to be highly beneficial: In my judgment, causing fully twice as much yield of crop as without it. I have no ditch and water right on my farm, by which to irrigate my bench and upland. If I had it would make nearly a double difference in my crops, and would double the value of my ranch, at least. I have frequently seen Daniel Sturr in past years using the waters of Falsebottom creek, by means of his ditch, irrigating his crops. There are a number of those water ditches above and below his ranch, used for the purposes of irrigation, and I believe I know something of the value of a water right and

ditch in that locality for that purpose, and it is my judgment from my experience in Colorado and Dakota, that the water right and ditch known as the Elm Tree water right and ditch, now the subject of controversy, is reasonably of the value of six thousand dollars and over, for the purposes of irrigation in the locality where used.

EMILE ODOU.

Subscribed and sworn to before me this 31st day of October, 1889,

JOHN A. GASTON,
Notary Public.

[SEAL.]

TERRITORY OF DAKOTA, } ss.
COUNTY OF LAWRENCE. }

William B. Perkins being first duly sworn deposes and says: I am fifty-seven years of age. I reside in Redwater valley in Lawrence County in this territory near the junction of Falsebottom creek and the Redwater. I have been acquainted with the effects of irrigation upon growing crops for about twenty-five years: In Utah in 1865; In Montana in 1864-5-6-7; in New Mexico in 1868-9 and 1870. I commenced farming in Colorado in 1871 and farmed there until 1877, when I removed to where I now live and became well acquainted personally with the value of irrigation upon growing crops, and the value of water rights and ditches for the purposes of irrigation in the growing seasons, upon ranches and farms both in Colorado and Dakota. I own a ranch of six hundred acres of land in Redwater valley and a one-seventh interest in a ditch and water right that originally cost me what I estimated at the time, was the equivalent of about one thousand dollars. With my proportion of the water I successfully cultivate about 200 acres of my ranch each year, raising small grain, vegetables of different kinds, corn and hay. If I had not water to irrigate my fields with in the growing sea-

son, the crops would be failures. The same would be true of the other farmers in that valley and in the Falsebottom valley. I estimate that the reasonable value of my farm or ranch, is $12,000; and if I could not have water to irrigate with I would not remain upon it. I would sell it or abandon it and move away, as the yield of crops from cultivation, would not average fifty per cent of the crops—one year with another, of what they do with the aid of it.

I am personally acquainted with Daniel Sturr, the appellant in this case, and with his ranch on Falsebottom in Lawrence County, since 1878 or 1879. My market is mainly Deadwood and the other mining towns in that county; and I pass over his ranch going to and returning from Deadwood, at least once a week during the year on an average. I have seen him frequently during the 5 or 6 years before his difficulty with Beck, the Respondent, using the waters of Falsebottom in the growing season irrigating his crops. From what I know particularly of the value of water rights and ditches for the purposes of irrigating crops it is my judgment that the water right and ditch known as the "Elm Tree Water Right" claimed by Daniel Sturr and in controversy in this action, is of the reasonable value of more than $5,000 for the purposes of irrigation.

Even where there is a fair amount of rainfall in this latitude owing to the unevenness of the surface it runs off rapidly into rivulets, ravines and the lower levels like creek bottoms and does comparatively little only moistening the surface a little; but after this is done the water soaks into the ground as flown from an irrigating ditch, spreads more slowly over the land, sinks into it deeper, and by reason of its longer continuance in the soil, does more good.

W. B. PERKINS.

Subscribed and sworn to before me this 29th day of October, 1889.

WILLIAM L. MCLAUGHLIN,
Notary Public.

[SEAL.]

AFFIDAVIT OF JOHN H. WIDDOWS ON APPELLANT'S BEHALF.

TERRITORY OF DAKOTA, }
COUNTY OF LAWRENCE. } ss.

John H. Widdows being first duly sworn, deposes and says: I am by occupation a farmer and thirty-seven years of age; have resided on a farm at the mouth of Falsebottom on Redwater, in Butte County, Dakota, since 1880. I own one hundred acres of land which I cultivate and raise grain, vegetables and hay thereon, with the aid of one hundred inches of water to irrigate. If I had not water to irrigate my claim or farm I should not remain upon it, as I believe the attempt to cultivate land in this country without the aid of irrigation would be unremunerative and failures. It is my opinion that the one hundred inches of water which I own and use for irrigation on my farm is of the reasonable value each year to me, at its lowest value, of five hundred dollars. All the profitable farming carried on the Redwater valley and in the Falsebottom valley has to have the aid of irrigation to insure fair crops. I am familiar with both localities, and nearly always travel the Falsebottom road in going and returning from the Deadwood market. I necessarily have to cross Falsebottom creek, nine times in going to, and the same number of times in returning from Deadwood. I average about five trips a month each way.

I know where the ranch of Daniel Sturr is on Falsebottom and necessarily have to cross the creek upon as well as below and above his ranch, and I know that water runs in the creek now as it has at all seassons of the year. There is a good irrigation head of water flowing there now. Below his ranch the water sinks or disappears in the gravel and comes to the surface again in places and flows on until it sinks again.

In my judgment as a farmer, and with nine years experience, I judge that the crops on the Sturr farm one year with another, without the aid of irrigation will not

exceed fifty per cent. of what will be produced on the same acreage with its aid; and to be deprived of it is a positive damage to him. How much I cannot say.

JOHN H. WIDDOWS.

Subscribed and sworn to before me this 24th day of November, A. D., 1889.

WILLIAM L. McLAUGHLIN
[SEAL.] Notary Public.

AFFIDAVIT OF JOSEPH FULLER ON BEHALF OF APPELLANT.

TERRITORY OF DAKOTA, }
COUNTY OF LAWRENCE. } ss.

Joseph Fuller being first duly sworn, deposes and says: I reside about 3 miles below the ranch of Daniel Sturr, the appellant, on Falsebottom, in Lawrence County, Dakota Territory; am 35 years of age, and have followed farming as my occupation since I was a boy. I own 160 acres of table or bench land on Falsebottom which I do not cultivate because I have no water nor can I get any to irrigate with. I rent a small tract of land below what is called the Knight ditch for which I have to pay five dollars an acre a year and this I cultivate successfully by the aid of irrigation from the Knight ditch. This ditch takes the water from Falsebottom Creek between 2 and 3 miles below Sturr's ranch. There is now fully 300 inches of water, miners' measurement, flowing in the stream at that point. Just above the head of the "Elm Tree water right and ditch" —the property in controversy in this action as I understand it, where the stream is flowing freely, there is fully as much water as below at the point named. Between these the bed of the stream in places, and for considerable distances is temporarily filled with loose gravel and boulders through and beneath which the water of the creek flows on down the channel, coming to the

surface now and then, and showing a large body of running water. Each spring freshet removes these bodies of gravel further and lower down the stream. I suppose the name of the stream is taken from the fact that where these obstructions occurr it is apparently the bottom or bed of the creek, when in fact it is not so.

My experience in farming on Falsebottom has shown me that the same character of land above the line of the ditches in that locality will produce only about one third as much crop as the land below them that has the aid of irrigation.

I am personally acquainted with both the parties to this action and know both of their ranches. I have seen Sturr in former years frequently irrigating his crops with the water brought to his ranch through the Elm Tree ditch, and have noticed the beneficial effects of irrigation from the other ditches in the locality on growing crops since living there; and I believe I know something of the value of ditches and water rights in the Falsebottom valley. It is my opinion that the Elm Tree water right and ditch was reasonably of the value of $6,000 and over when Beck took possession of it in 1886. It has been allowed to fall into disuse and fill up since, but it can be restored and put in repair again for the purpose of conveying water at a moderate cost—say about one hundred dollars.

JOSEPH FULLER.

Subscribed and sworn to before me this 2nd day of November, A. D., 1889.

FRANK E. ICKES,
Notary Public.

[SEAL.]

AFFIDAVIT OF CHARLIE RENNER ON BEHALF OF APPELLANT.

TERRITORY OF DAKOTA, }
COUNTY OF LAWRENCE. } ss.

Charlie Renner being first duly sworn deposesand

says: I am 36 years of age, a farmer by occupation since 1875, and have resided on Falsebottom in Lawrence County, Dakota Territory, since 1880. I own a farm or ranch of 160 acres of upland two miles west of Joseph Fuller's place. I have heard read his affidavit this day taken before Frank E. Ickes, Notary public, and was present when Fuller dictated the same, and therefore am familiar with its contents. Except such parts as are personal to himself, I know that the facts therein stated are true.

I have cultivated about 40 acres of my ranch, but do not make a success of it for the want of water to irrigate with. It is west of and above Knight's ditch. Last year I rented a tract of land below Knight's ditch where I could irrigate and had to pay eight dollars an acre for it that year, but got it this year for five dollars an acre. The result of crop from the land above compared with that below where I could irrigate was as one to three. I know Mr. Sturr and Mr. Beck, and their respective ranches, and the "Elm Tree water right and ditch," the subject in controversy in this action, as I understand it. I believe I know something about the value of water rights and ditches in that locality, and in my judgment that water right and ditch at a low estimate is worth not less than $6,000. I estimate its value as worth for irrigating purposes $2,000 a year.

The Knight ditch takes out in the irrigating season below Sturr's ranch about 200 inches of water. There is fully 300 inches of water flowing in Falsebottom above the head of that ditch now, and to all appearances there is about the same amount flowing in the creek a short distance above the head of the Elm Tree ditch.

CHARLIE RENNER.

Subscribed and sworn to before me this 2nd day of November, A. D., 1889.

FRANK E. ICKES,
Notary Public.

[SEAL.]

AFFIDAVIT OF GEORGE D. FOGLESONG ON APPELLANT'S BEHALF.

TERRITORY OF DAKOTA, }
COUNTY OF LAWRENCE. } ss.

George D. Foglesong jr. being first duly sworn by me deposes and says: I am 26 years of age, a farmer by occupation, and have resided on Falsebottom creek in this county for the past nine years. I know Daniel Sturr and Charles W. Beck the parties to this action and the respective ranches on which they reside. My ranch is about five miles below Sturr's on Falsebottom creek. I own 160 acres of land there and have ninety acres under cultivation—about fifteen of which only are under the irrigating ditch owned by myself and a man named J. A. Todd. This ditch was taken out from Falsebottom creek about 4½ miles below the Sturr ranch, and we use about 200 inches of water for irrigation in the growing season. The water sinks, so to speak, below Sturr's ranch, that is, flows beneath or through a temporary lodgment of stones and gravel for a short distance unseen, and then appears again flowing in the natural channel. Where the head of our ditch intersects the creek there are at least five hundred inches of water flowing on an average during the irrigating season. There are other ditches in the same neighborhood that take out the water of Falsebottom creek for irrigation below Sturr's ranch, and above ours. Land in that locality cultivated with the aid of irrigation, yields twice as much grain, vegetables and hay as without it, and more I know something of the value of ditches and water rights in that locality for the purposes of irrigation. I know the Elm Tree water right and ditch claimed by Sturr, and in controversy in this action and in my judgment it is reasonably worth more than $5,000, and has been worth more than that for some years past.

GEO. D. FOGLESONG.

Subscribed and sworn to before me this 2d day of November, A. D. 1889.

FRANK E. ICKES,
Notary Public.

[SEAL.]

AFFIDAVIT OF DANIEL STURR ON BEHALF OF APPELLANT.

TERRITORY OF DAKOTA, }
COUNTY OF LAWRENCE. } ss.

Daniel Sturr, of lawful age, being first duly sworn, deposes and says as follows: My name is Daniel Sturr. I am the plaintiff and the appellant in this case I am a farmer by occupation, and have lived on my ranch, on Falsebottom creek, in Lawrence County, Dakota Territory, for the past twelve years or more, where I still reside.

In May, 1880, I located a water right on Falsebottom creek, on the ranch of one John Smith, adjoining mine on the south, turned the water from the stream and proceeded with due diligence in constructing a ditch from the point of diversion across Smith's ranch, about two hundred and sixty or seventy rods, perhaps more, to my own ranch, which I completed in the early party of July, in that year, and brought the water of Falsebottom Creek from the point of diversion, through the ditch, to my fields, where I used it in irrigating my crops. I claimed in my notice of location, five hundred inches, miners' measurement, of said water, but did not use quite that amount. I expended upwards of five hundred dollars at that time in turning the water and completing the ditch, and used the same without interference or interruption, from any one until June, 1886, when Charles. W. Beck, defendant and respondent, who had purchased the Smith ranch forbade me from going upon his farm, to repair my ditch, and obstructed the same, and turned the water out of the ditch, to irrigate his own crops on his own land. With an axe in his hand, he threatened me if I entered upon his land to remove the obstruction out of the ditch, and maintained a hostile attitude thereafter. The loss of the water to me that year caused a damage to my crops of not less than two thousand dollars, and I was damaged and injured in consequence not less than the sum of

two thousand dollars, in this, to-wit: I had about seventy-five or eighty acres of land under cultivation, and sown in grain, various kinds of vegetables, etc., which were very promising at the time that Beck shut off the water from me. The result was that the whole acreage of my crop suffered from drought, did not mature, as in former years, and did not yield me one half as much of the same kind of seed, acre for acre, on an average, as the six years before; and the past three seasons, with the same care and attention given by me to the crops, except irrigating them, has not yielded acre for acre, on my farm, more than about fifty per cent. of the yield when I irrigated them.

There are a number of irrigation ditches which take the water out of Falsebottom creek, above and below my farm. I am acquainted with them and know the value of such ditches and the water rights connected with them, for the purpose of irrigating growing crops, in the locality of the ditch and water right in controversy. In my judgment the Elm Tree ditch and water right is reasonably of the value of seven thousand five hundred dollars. It is of that value to me for the purposes for which it was located and used, and if I shall be deprived of it, I would not consider my present farm of two hundred acres acres, of much value. If I could not sell it, I would abandon it and go elsewhere to farm.

I have read what purports to be the affidavits of James H. Kearney, William O. Heake, Elham Smith, John Dietsche and Charles W. Beck, in support of the motion to dismiss for want of jurisdiction, and have noted their contents. The statement of James H. Kearney, that the ditch in controversy was taken out in 1877 is wholly incorrect, as I did not make the location of the Elm Tree water right until the 15th of May, 1880. The ditch was taken out some days later.

I have known him since the spring of 1880, when he was a boy and he has lived nearly all that time

within a mile of my place. He has lived with his fathers family, on an adjoining ranch to mine. Neither he or his father, during that time have ever done any irrigating of crops, on their ranch, or constructed or used ditches on the same for the purpose of irrigation. They attempted some farming every year, but the same has been a failure, and their attention now is devoted to raising horses and cattle.

William O. Heake has a ranch below mine on Falsebottom. He has no means of irrigation. He, too, has attempted farming on his ranch, and the result has been a failure. I have frequently heard him declare that the yield from his crops would not pay the taxes on the land. He is now engaged in raising and trading stock.

Elham Smith's ranch is about two miles southwest of mine, and he is engaged somewhat largely in the dairy business, and hence has no need of an irrigating ditch, and has none. He does not irrigate his crops.

John Dietsche has no ditch on his ranch and does not irrigate his crops. I have known him since 1877, and during that time I have never known him engaged in the irrigation of crops or the construction of ditches for the purposes of irrigation in any part of the country.

Charles W. Beck, the respondent, has not done any irrigating of crops, except through my ditch, which he forcibly took pooession of in June, 1886, which was flowing not less than three hundred miners' inches at the time. He has no ditch of his own on his ranch, or leading to it.

He never offered to sell me his adverse claim to this water right and ditch in controversy and his ranch, for five thousand dollars, or any other sum, and I never authorized Daniel McLaughlin or any other person to negotiate with him for the sale of his ranch or his ad-

verse claim to the water right, because I believed the water right and ditch belonged to me, under my construction of the law regulating rights to the use of water by prior appropriation on the public lands. Without this water right, I do not value Mr. Beck's ranch worth much.

I have heard read the affidavit of Emile Odou, this day made, regarding the condition of the main Falsebottom creek above the head of the Elm Tree water right and ditch. I visited the same this day, and his statement as to the flow of water therein, and the character of the temporary obstruction therin is correct.

Beck, the respondent, has not attempted to keep the head of the ditch open and in repair this year, or to remove the accumulation of gravel and larger stones from the creek, at the head of the ditch, so that it might receive the running water flowing through this coarse gravel. Why he has failed to do so I can surmise, but cannot certainly state his reasons. I can, at a comparatively moderate expense open a passage from the head of the ditch through this gravel, to where the water is flowing freely, a short distance above. A few lengths of sluice boxes or flumes will intersect the flow of water, owing to the crookedness of the stream just above.

Affiant further says that he has at no time desired or asked for a moments delay in the disposition of this case, in any of the courts through which it passed, or in this.

DANIEL STURR.

Subscribed and sworn to before me this 31st day of October, 1889,

JOHN A. GASTON,
Notary Public.

[SEAL.]

AFFIDAVIT OF FREDERICK W. WHITE ON APPELLANT'S BEHALF.

TERRITORY OF DAKOTA, }
COUNTY OF LAWRENCE. } ss.

Frederick W. White being by me first duly sworn, deposes and says: I am by occupation, a farmer and miner. At present I am working for the Homestake Mining company at Lead City in this county. I am 34 years of age. I followed farming for 20 years, eight of which were in Falsebottom valley in this county. I am the same person who made affidavit in November, 1888 for use in the Supreme Court of Dakota Territory in connection with Daniel Sturr. I am acquainted with the cost of constructing ditches for the purpose of irrigation and the value of water rights in connection with the same for the purposes of irrigation in the location of the "Elm Tree water right and ditch" now tne subject of controversy in this action, and in my judgment the said Elm Tree water right and ditch, was, in 1886 when taken possession of by Charles W. Beck and is now, reasonably worth more than $5,000 that is to say is of the value of $7,500.

I have heard read the affidavit of Daniel Sturr, which was taken before John A. Gaston, Notary Public, on the 31st day of October, 1889, in this case, and know its contents, and I am somewhat familiar with the facts he details therein in relation to the condition of Falsebottom creek and the disappearance and appearance of water therein and the causes thereof, and I know the same to be substantially correct.

FREDERICK W. WHITE.

Subscribed and sworn to before me this 2d day of November, A. D., 1889.

J F. EDMONDS,
Notary Public.

[SEAL.]

TERRITORY OF DAKOTA, }
COUNTY OF LAWRENCE. } ss.

I W. H. Jones, Clerk of the District Court, of the First Judicial District of Dakota Territory in and for Lawrence County, do hereby certify that I am well acquainted with the signatures of William L. McLaughlin, notary public, John A. Gaston, notary public, Frank E. Ickes, notary public, J. F. Edmonds, notary public and Norman T. Mason, notary public; all residing at Deadwood, in said county, and having their respective offices there, and I am also acquainted with the impressions of their respective notarial seals; and I further certify that the signature of William L. McLaughlin attached to the affidavit of John H. Widdows and of W. B. Perkins is his genuine signature and the seal thereon is the impression of his notarial seal; that the signature of Frank E. Ickes attached to the affidavits of Joseph Fuller, Charles Renner and George D. Foglesong is his genuine signature and the seal thereon is the impression of his notarial seal; that the signature of John A. Gaston attached to the affidavits of Emile Odou and Daniel Sturr is his genuine signature and the seal thereon is the impression of his notarial seal; that the signatures of Norman T. Mason and J. F. Edmonds respectively attached to the affidavit of Albert Henderson and to that of Frederick W. White, are their respective genuine signatures and the seals thereon are respectively the impression of their respective notarial seals.

I further certify that the jurat to each affidavit is in due form, and that notaries public are by law authorized to administer oaths in this territory.

In testimony whereof I have hereunto set my hand and affixed the seal of this court at Deadwood, in said county, this 2d day of November, A. D., 1889.

W. H. JONES,
Clerk as Aforesaid.

By LOUIS CAULFIED,
Deputy.

[SEAL.]

It is more difficult in equitable actions to definitely determine the value of the matter in dispute than in legal ones. The market value is wanting. Ditches and water rights cannot so readily be assessed and appraised. as the land over which the one is constructed and upon which the other is used for irrigation. Yet the language of section 2339 of the U. S. Rev. Stat., is explicit, that when rights to the use of water by prior appropriation have vested and accrued, such rights must be maintained and protected by the courts.

The testimony of William B. Perkins, Emile Odou, Albert Henderson, Joseph Fuller, Charles Renner, George D. Foglesong, Daniel Sturr and Frederick W. White show that the reasonable value of this ditch and water right is over $5,000, some of them fixing its value at not less than $6.000, and some at $7,500. Joseph Widdow says it is of great value, but hesitates to make an estimate. Since each and all of these witnesses show their competency to testify on the subject of the value of the matter in dispute, their testimony ought to have value and weight.

RECORD.—By the motion of respondent we are notified that the record will be relied on in its support, but what part of it we are not advised. The complaint is in the nature of a bill in equity, seeking an injunction in the lower court to restrain the defendant from interference with plaintiff's alleged water right and ditch, the right to which is alleged to have vested and accrued to him in 1880; that he used the water each year thereafter for the purpose of irrigating his crops; that without its use his crops would be failures; that in the early summer of 1886 the defendant took forcible possession of plaintiff's water right and ditch, obstructed the ditch and used the water therefrom upon his own fields, irrigating his own crops, causing injury and damage to the plaintiff by being deprived of the water that year, in the sum of two thousand dollars. (*Printed Record, pp.* 1, 2 *and* 3.)

The defendant answered denying plaintiff's alleged priority of possession and appropriation of the water; and, by way of counter claim, alleged that one John Smith entered 160 acres of land south of and adjoining Sturr's ranch as a homestead on the 25th day of March, 1879, at the U. S. land office in Deadwood, and thereby became the owner of the land and of the water flowing over it, and entitled to its use and enjoyment; that in February, 1883, he (Smith) made final proof at the land office and received his final certificate of entry for his homestead claim; that the patent therefor afterwards issued to him which took effect by relation, as of the date of his original entry; and that in May, 1884, the defendant purchased from him the said ranch receiving a warrantee deed with full covenants, &c., and by reason thereof was the owner of land and water.

That plaintiff located his water right, and constructed his ditch on said Smith's premises in May, 1880, and appropriated and diverted upwards of 300 inches of the water of Falsebottom creek through it to his own ranch where he used the same irrigating his crops; that at the time of making this appropriation the waters of the creek were flowing in their natural channel upon and over said Smith's homestead, and that the diversion of the water was unauthorized and wrongful, and plaintiff had no right to divert the same. That Smith protested against the said diversion at the time, but being ignorant of the law and of his rights in the premises, he was awed by intimidations and threats, and the ditch was dug.

Defendant admits that he took possession of the water right and ditch as alleged, prays to be awarded a perpetual injunction against the plaintiff, asks for one thousand dollars damages and costs on account of plaintiff's trespasses on his land. (*Printed Record, pp.* 5, 6 *and* 7.)

He also declared in his answer that if he should be deprived of the use of this water for irrigating, his

farm would be rendered of little value, and that he would be greatly and irreparably damaged. (*Printed Record, pp.* 4 *and* 5.)

This answer was sworn to by Beck, the respondent, on the 26th day of July, 1887, before the same notary public that he and the four others now swear that the same water right and ditch *has no value.* (*Printed Record, p.* 7.)

This recent estimate of the value of the water right and ditch forcibly taken by Beck, the respondent, from Sturr, the appellant, does not accord with the value he placed upon it in 1887, in his answer. Then its loss to him would be a great and irreparable damage, he said; now its of no value.

AGREED STATEMENT OF FACTS—The case was submitted, tried and determined upon an agreed statement of facts prepared and signed for the parties by their respective attorneys. *Printed Record, pp.* 8 *to* 13 *inclusive.*

In this statement it was mutually agreed and declared that the cost of constructing the Sturr ditch in 1880 was $500. In the face of this record admission the respondent now undertakes to show by Elham Smith's affidavit that it could be constructed for fifty dollars; by William O. Heakes for sixty dollars; and by James H. Kearney's for one hundred dollars. (*See affidavits on file and printed in the brief and argument of respondent.*)

It is also admitted in this agreed statement that Sturr completed his ditch with diligence, and conveyed 300 inches of the water of Falsebottom creek across Smith's homestead to his own for irrigation, and that its use was beneficial and profitable until Beck's interference. (*Printed Record, p.* 10.)

That in ordinary seasons in the locality named, irrigation is necessary for the crops planted and sown, and without it they are usually failures. (*Printed Record, p.* 10, *paragraph* 11.)

Contrast these record admissions with respondent's efforts now to repudiate them by strange sounding affidavits.

The patent issued to John Smith, December 20th, 1883, for his homestead entry is, by its terms, subject to vested and accrued water rights for agricultural purposes and rights to ditches and reservoirs used in connection therewith. (*Printed Record, p.* 12.)

The statement in the motion that the appeal was taken for delay is without support in the record or in the affidavits of respondent.

The appellant Daniel Sturr testifies in his affidavit that he has at no time desired or asked for one moments delay in this Court or in the others through which the case has passed. He flatly contradicts the respondent in his statement that the latter offered to sell him his ranch and his interest in the water right in dispute, though that is not a material matter. The respondent seems to have the ability to contradict himself when he thinks it is necessary.

The motion, we think, should be overruled, and the case disposed of on its merits and on the law.

DANIEL McLAUGHLIN, and
WILLIAM R. STEELE,
Counsel for Appellant.

WILLIAM L. McLAUGHLIN
Attorney for Appellant in Opposition to Motion to Dismiss.

FILED
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JAMES H. McKENNEY
CLERK

IN THE SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1889.

NO. 1172.

DANIEL STURR, APPELLANT,
vs.
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APPEAL FROM DAKOTA SUPREME COURT.

VAN CISE & WILSON,
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Brief and Argument of Appellee.

We submit this case upon a motion to dismiss the appeal for want of jurisdiction, and united with it a motion to affirm the judgment, on the ground that though the Court may conclude it has jurisdiction yet an inspection of the record will show the judgment of the Court below to be clearly right.

FOR DISMISSAL

We respectfully submit the affidavits of James H. Kearney, Wm. O. Heake, Elham Smith, John Dietschi and Charles W. Beck, showing conclusively that the ditch and water right in controversy is not only not worth $5,000, but has only a nominal value. These men show themselves thoroughly familiar with the locality, the False Bottom creek,

from which the ditch is taken, and its flow of water during several years, and with the value of that species of property, and they agree that the matter in controversy is of no value whatever.

The right of appeal from the Territorial Supreme Courts is limited by the Act of March 3, 1885, (23 Stats. at Large Chap. 355, p. 443,) to cases where "the matter in dispute exclusive of costs shall exceed the sum of five thousand dollars." There can be no contention that the second Section of the Act has any application here, counsel for appellant relying upon value as shown by the affidavit filed. The rule is too well settled for argument that where jurisdiction is conferred or limited by statute the requirements of the statute must be strictly complied with or the jurisdiction does not vest. The old statute allowing appeals from the judgments of Territorial Supreme Courts (U. S. Revised Statutes, Sec. 702) limited the right to "cases where the value of the matter in dispute, *to be ascertained by the oath of either party, or of other competent witnesses,* exceeds one thousand dollars." The later statute of 1885 states no method of acertaining the value, but as the practice under statutes allowing appeals and writs of error from Circuit Courts but silent as to method of determining value, seems to have been to receive affidavits on the subject, we suppose the same practice will obtain here. Cases arising under such statutes will therefore be in point.

In Wells vs. Wilkins, 116 U. S. 393, the plaintiff in error filed two affidavits to the effect that the value was more than $5,000. After the cases were docketed the defendant in error filed counter-affidavits showing the value to be very much less than that amount, and the Court, apparently on its own motion, dismissed the writs of error for want of jurisdiction.

The following cases further illustrate the practice upon this subject:

Exparte Bradstreet, 7 Peters, 634.
Richmond vs. City of Milwaukee, 21 How., 391.
Lockwood vs. the Schooner Grace, etc. 6 Wall., 441.
Smith et al. vs. Adams, 130 U. S. 167.

A stipulation as to value will not confer jurisdiction where the actual value is below the amount fixed by statute.

Gruner vs. the United States, 11 How., 163.
Webster vs. Buffalo Ins. Co. 110 U. S., 386.

The burden of establishing jurisdiction is on the appellant.

Hagan vs. Foison, 10 Peters, 160.
Troy vs. Evans, 97 U. S., 1.

FOR AFFIRMANCE.

Upon the motion to affirm, we submit: This appeal is clearly frivolous both in its attempt to review the findings of fact of the trial Court and in its objections to the conclusions of law.

This Court has decided so many times that on an appeal from a Territorial Court it will not go behind the findings of fact adopted by the trial Court and by affirmance of judgment approved by the Appellate Court to consider the evidence or an agreed statement of facts that it seems almost disrespectful to cite the cases:

Stringfellow vs. Cain. 9 Otto, 610.
Cannon vs. Pratt, Ibid., 618.
Neslin vs. Wells, Fargo & Co., 14 Otto., 428.
Davis vs. Fredericks, Ibid., 618.
Hecht vs. Boughton, 15 Otto., 235.
Gray vs. Howe et al., 108 U. S., 12.
Eilers vs. Boatman, 111 U. S., 356.
O'Reilly vs. Campbell, 116 U. S., 418.
Zeckendorf vs. Johnson, 123 U. S., 617.

There are no assignments of error in the record, but it will be seen that the motion for new trial assails findings of fact No. 10 and No. 2, and the argument of Counsel assumes many things not in the findings.

This can not be done here under the authorities cited.

The findings of fact in this case clearly sustain the conclusions of law, and authorize the judgment entered in the case. Briefly stated, they are: That in June, 1877, Appellant Sturr settled on 160 acres of land in Section 35; on May 15, 1880, made homestead entry thereof; on March 10, 1883, made his final proof; and thereafter continuing to reside there and cultivate the land, received a patent therefor. That one John Smith settled on 160 acres in Section 2 in March, 1877; made home-tead entry thereof March 25, 1879, and final proof March 10, 1883, and has since received a patent; that he resided upon the land continuously until May, 1884, when he sold to Appellee Beck by warranty deed without reservation, and Beck has since been in possession. That on May, 15, 1880, Sturr, without any grant from Smith, went upon Smith's homestead and located a water right thereon, claiming the right to divert 500 inches of water from False Bottom creek then and long prior thereto flowing across Smith's land in its natural channel, and to carry the same by means of a ditch to and upon his own homestead adjoining. That Sturr posted a notice of his proposed diversion, and on the 9th of May, 1881, recorded a copy of it in the office of the register of deeds of Lawrence county. That thereupon Sturr constructed a

ditch across the Smith homestead and carried 300 inches of water from False Bottom creek by means of the ditch to his own land and there used the same for irrigation when necessary until the summer of 1886, when Appellee Beck notified him to stop and forbade him maintaining a ditch on his (Beck's) land. That there has existed a custom in Lawrence county, Dakota, since its settlement, recognizing the right to locate water rights and appropriate water from flowing streams for purposes of irrigation, when such diversion and use do not conflict or interfere with rights vested and accrued prior thereto. That neither Smith nor Beck ever made any water right location on False Bottom creek or diverted its water from the natural channel where it had been accustomed to flow. That John Smith on February 2, 1882, recited in a written contract with Sturr of that date that Sturr was the owner of the Elm Tree water right, which was the name he had given the location of May 15, 1880. That the use of this water for irrigation is beneficial and valuable to any one entitled so to use it.

Upon these facts the Court properly concluded: That at the time of the location of the water right by Sturr on John Smith's homestead in May, 1880, a prior right to have the water of False Bottom creek flow in its regular channel over Smith's land had vested in him by virtue of his homestead entry of March 25, 1879. That this vested right passed by Smith's deed to Beck May 1, 1884. That Sturr by his ditch and diversion of the water in May, 1880, acquired no right as against Beck to divert the water of the creek or maintain a ditch for that purpose on Beck's land. That the patent issued to Smith for the homestead related back to the date of his entry thereof March 25, 1879. That Sturr could take nothing by the action.

Now it will be noted the important facts in this case are: (1) The homesteader Smith, under whom appellee claims, is prior in time of settlement, in time of entry, and in time of final proof to Beck. (2) The location of a water right, digging of ditch and appropriation of water by Sturr over and through Smith's land was without any grant from Smith. Upon these two points the case turned: (1) Smith being prior in time was prior in right. (2) Sturr's few years' use of ditch and water without a formal objection from Smith gave him no vested right, but amounted only to a parol license revocable at pleasure. These propositions we consider in their order:

I.

That Smith, under whom appellee claims, being prior in time was prior in right to Beck, we think the law is well settled. Counsel

for appellant cite authorities to sustain a case existing in imagination only, that their client was an appropriator of the water before Smith appropriated it by taking the land through which it ran. The case of Basey vs. Gallagher, 20 Wall., 670, and cases like it, have no application because they do not fit the facts. The controversy here is one between appellee's claim to the water by virtue of his grantor's settlement in March, 1877, homestead entry in March, 1879, final proof March, 1883, patent December, 1883, his purchase May, 1884, with continuous residence and cultivation of the land since March, 1877, on one hand and appellant's trespass upon that homestead, digging of ditch and diversion of water May 15, 1880, on the other. Who was first to appropriate this water? The man who in March, 1877, appropriated the land through which it was flowing, or he who three years later undertook without permission to divert it from its natural channel? Clearly, the former.

The Dakota Civil Code Sec. 255, is but a declaration of the common law on this subject: "The owner of land owns water standing thereon, or flowing over or under its surface but not forming a definite stream. Water running in a definite stream formed by nature over or under the surface may be used by him as long as it remains there, but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue or pollute the same."

The Act of Congress on which counsel for appellant rely (U. S. Revised Statutes Sec. 2339) is not in conflict with this:

"Whenever *by priority of possession*, rights to the use of water for mining, agricultural, manufacturing or other purposes have *vested and accrued*, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of *such vested rights* shall be maintained and protected in the same and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed." The italics are ours, simply to emphasize the fact that it is only the *prior appropriator* of water who secures a *vested right* in it.

The difficulty with counsel for appellant is in assuming that appellee did not get any right in this water until time of final proof on the land, March 10, 1883. This is inconsistent with the whole theory of our land laws and the practice under them. Appellee appropriated the water or its usufruct, when he appropriated the land in March, 1877. He did not need to cut a ditch or divert the water from the stream to appropriate it, or secure a proprietary interest in it. The

law gave the use of the water to him while it ran through his farm. "*Aqua currit et currere debet, ut currere solebat.*" To make appellant a prior appropriator he must have taken out the water under a claim of right while the land on which he diverted it was still in the possession of the government, and before any claim or settlement had been made upon it by an individual qualified under the land laws to acquire title to it. This is the doctrine of the cases wherever riparian rights are recognized. We cite:

Union Mill & M. Co. vs. Dangberg, 2 Sawyer, 450 at 455.
Lux vs. Haggin, 4 Pac. Rep., 919, at 925, 927, 929.
Same Case, 10 Pac. Rep., 674, at 727, 743, 745-6, 753-4.
Weiss vs. Oregon I. & S. Co., 11 Pac. Rep., 255, at 256.
Crandall vs. Woods, 8 Cal., 136, 141, 143-4.

The last case is quite in point. The Court says (p. 143-4): "But an appropriatjon of land carries with it the water on the land, or a usufruct in the water, for in such cases the party does not appropriate the water, but the land covered with water. * * * One who locates upon public lands with a view of appropriating them to his own use becomes the absolute owner thereof as against every one but the government and is entitled to all the privileges and incidents which appertain to the soil, subject to the single exception of *rights antecedently acquired.*

The later case of Lux vs. Haggin, *supra,* recognizes this as the doctrine of the California cases distinctly (10 Pac. Rep. at p. 746): "Inasmuch as the Sections of the Code relating to water rights (so far as they relate to appropriations of water on the public lands of the State or of the United States) are in furtherance and recognition of the previous doctrine of the Courts of the State, (according to which, as it would seem *the prior appropriator of land and the water thereon had the better right, as against the subsequent appropriator of the water alone*) it may be contended that Section 1422 recognizes and reaffirms that part of the rule, and protects the riparian *occupant* on the public lands of the State from a subsequent appropriation of water on or above those lands."

The Section 1422 referred to above is a qualification at the conclusion of Title VIII of the California Civil Code, on "Water Rights," and is as follows: "The rights of riparian proprietors are not affected by the provisions of this title." This is not nearly so explicit as the language of the Dakota Statute cited by Counsel for Appellant (pp. 41-2 of their brief): "Sec. 1. That any person o persons, corporation or company, who may have or hold a title, or *possessory right* or title to any mineral or agricultural lands within the limits of this

Territory, *shall be entitled to the usual enjoyment of the waters of the streams or creeks in said Territory* for mining, milling, agricultural or domestic purposes; provided, that the right to such use shall not interfere with any prior right or claim to such waters when the law has been complied with in doing the necessary work."

This is a clear recognition of the better right in the first occupant or possessor of the public domain, through which the water flows. Another provision of Dakota law is equally explicit: (Code of Civil Procedure Sec. 650.) "Any person settled upon the public lands belonging to the United States, on which settlement is not expressly prohibited by Congress, or some department of the general government, may maintain an action for any injuries done the same, also an action to recover the possession thereof, in the same manner as if he possessed a fee-simple title to said lands."

The Congressional Act relied upon (U. S. Rev. Stats. Sec. 2339) only recognizes title to water acquired *by priority of possession*, but counsel for appellant deny that any title to land can be thus acquired. We believe it is elementary that possession is one species of title to realty (2 Blackstone 195.) In mining cases it has been frequently held since the case of English vs. Johnson (17 Cal. 107) that possession is a good title against an intruder, and Congress has recognized this doctrine by Statute (U. S. Revised Statutes Sec. 910.) Is there any reason why the same should not be true of agricultural claims, or claims of any other character to land the paramount title to which is in the government? This honorable Court has recognized the value of prior possession against intruders in the following among many cases:

Atherton vs. Fowler, 6 Otto., 513.
Lamb vs. Davenport, 18 Wall., 307.
Trenouth vs. San Francisco, 10 Otto., 251.
Durand vs. Martin, 120 U. S., 366.

The land department is controlled by this view, that possession is the inception of the right, that first actual appropriation is the important question, and its investigations at local land offices and all contests had there are directed to ascertaining whose settlement was first made, who first asserted dominion over the soil to which the government's liberality invited him Could it be possible that a different rule would be adopted in a contest between an appropriator of the land with the water, and a claimant of the water asking to divert it from the land? It would be contrary to the whole philosophy of our land laws and regulations. Hence, Congress in enacting for the benefit of the historic "Great American Desert" that prior appropri-

ators of water should be protected, meant no more than if they had said prior appropriators of its land should be protected.

The appellee's grantor, too, made his homestead entry over a year prior to the attempted location of appellant's water right. This surely gave him a vested right in the land and in the use of the water. Appellant's counsel deny this and contend that a homestead entry like a pre-emptioner's declaratory statement vests no right until final proof. This is not the doctrine of the land department or the best considered decisions:

Opinion of Atty.-Gen. MacVeagh July 15, 1881, 1 Copp's P. L. Laws, 387, 388.
Red R. & L. W. R. Co. vs. Sture (Minn.) 20 N. W. Rep., 229, 230.
White vs. Hast. & Dak. R. R. Co., 2 Copp's P. L Laws, 878.
B. K. & S. W. R. Co. vs. Johnson (Kansas) 16 Pac. Rep., 125.

The law very clearly makes a distinction between homesteads and pre-emptions. In the latter the right does not vest until final proof and payment, yet the earlier pre-emptioner being an actual settler has an equity that will prevail over a later claimant; in the former the claimant makes his entry when he first goes to the land office, files his affidavit and pays his fees. Five years later he goes there to make proof. In the meantime no claim can be filed over him, nor his right disturbed except by a direct proceeding to cancel. Even the government cannot take his land for a military reservation. His right is vested until by a direct proceeding it is divested for non-compliance with conditions subsequent.

Counsel for appellant cite F. & M. P. R. R. Co. vs. Gordon, 41 Mich., 420, holding a contrary view and denying that the homestead entry gives any vested rights as against the government. But this case has been much criticised. It is sufficient, however, for the purposes of this discussion that all the cases agree that the right of the prior settler is a vested right as against the later comer, and if not protected in the land office, will in proper cases be protected by the Court, even after issue of patent to the other party.

Shepley vs. Cowan, 1 Otto, 330, is one of several cases of this character. The Court here comments on the earlier cases of Frisbie vs. Whitney, 9 Wall., 187, and the Yosemite Valley case, 15 Wall. 77, and properly limits their application to a decision that the settler under the pre-emption law acquires no vested rights as against the United States, but adds that "parties may as against each other acquire a right to be preferred in the purchase or other acquisition of the land when the United States have determined to sell or donate the property. In all such cases, the first in time in the commence-

ment of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right."

There would seem to be nothing in law or in reason that would limit the application of this doctrine to rival claimants for the land with the water flowing thereon, and exempt from its operation a later claimant for the water seeking by a trespass to divert it from the land.

Another quotation from Shepley vs. Cowan is applicable here: "The party who takes the initiatory steps in such cases if followed up to patent is deemed to have acquired the better right as against others to the premises. The patent which is afterwards issued relates back to the date of the initiatory act, and cuts off all intervening claimants. Thus the patent upon a state selection takes effect as of the time when the selection is made and reported to the land office, and the patent upon a pre-emption settlement takes effect from the time of the settlement as disclosed in the declaratory statement or proofs of the settler to the register of the local land office"

Congress has since distinctly recognized this doctrine by Statute: (Act of May 14, 1880, Suppl. to Revised Statutes Vol. 1, 1874-81, pp. 525-6, Sec 3): "That any settler who has settled, or who shall hereafter settle on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the pre-emption laws to put their claims on record, and *his right shall relate back to the date of settlement*, the same as if he settled under the pre-emption laws."

It would seem that with the laws of Dakota, and of the United States, the practice of the land department and the decisions of the Courts recognizing priority of possession as giving priority of right between rival claimants to land, the right ought to be equally clear with the prior possessor of land against a trespasser seeking to take from him a stream of water belonging to the land. We have no hesitation whatever in saying that a decision to the contrary by the Supreme Court of Washington Territory (Ellis vs. Pomeroy Improvement Co., 21 Pac. Rep., 27) on which counsel for appellant rely, is unsound in reasoning, and contrary to the settled doctrine of the Courts elsewhere, and to the letter and spirit of the Acts of Congress.

The findings of fact in this case at bar expressly limit the custom in Lawrence County, Dakota, of diverting and using water, to

cases where such diversion and use do not conflict with rights vested and accrued prior thereto. The Court's conclusion necessarily follows that at the time of Sturr's location of the water right in May, 1880, a prior right had vested in Smith to have the water of the creek flow across his homestead in its natural channel. This right passed to his grantee Beck, the appellee, The case of Basey vs. Gallagher (20 Wall., 670) in nowise conflicts with this view. That case was expressly limited to its own facts, and the Court carefully says: "Neither party has any title from the United States; no question as to the rights of riparian proprietors can therefore arise. It will be time enough to consider those rights when either of the parties has obtained the patent of the government." Again, commenting on the Act of Congress relied on here to establish a right to the use of water based on priority of possession and recognized by local customs, laws and decisions of Courts, the Court further says: "The law may be shown by evidence of the local custom, or by the legislation of the State or Territory, or the decisions of the Courts. The union of the three conditions in any particular case is not essential to the perfection of the right by priority, and *in any case of conflict between a local custom and a statutory regulation, the latter as of superior authority, must necessarily control.*" Hence if a custom could be said to have grown up in Lawrence County, Dakota, since its settlement (the Indian treaty was quieted and lawful settlement began Feb. 28, 1877,) nevertheless it is subordinate to statute, and as already shown in this brief the Statute of Dakota not only in express terms recognizes the right of riparian owners to the use of running water, but extends the right to the mere possessor of the adjoining land and qualifies the privilege of locating water rights by the recognition of such possessor's paramount rights.

II.

Another point urged below was that appellant's use of the ditch and water, although without a grant from Smith, grew into a vested right before Beck made his protest. This is not suggested here and Counsel have evidently concluded to abandon such an untenable proposition. It is enough that a possession not found in any sense to be adverse but apparently enjoyed by mere sufferance could not develop into title in six years. If Sturr's ditch and water right were an interest in the appellee's land by way of a servitude or easement, it could only have been acqired by grant, or its equivalent, prescription.

Dakota Civil Code, Secs, 245, 249.

Washburn on Easements, p. 18* and cases cited.

This was only a parol license at best and revocable at will, either by Smith or his successor in interest the appellee. The sale to appellee revoked it.

Washburn on Easements, 19*.
DeHora vs. United States, 5 Wall., 599.
Veghte vs. Raritan &c., Co., 4 C. E. Green, 153.
Drake vs. Wells, 11 Allen, 141 144.
Foot vs. N. H. & N. Co. et al, 23 Conn. 214, 223.

In any view of this case the judgment of the lower Court was right and ought to be affirmed.

VAN CISE & WILSON,
R. A. BURTON,
Attorneys for Appellee.

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IN THE SUPREME COURT,

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REPLY TO APPELLANT'S BRIEF IN OPPOSITION.

VAN CISE & WILSON,
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ATTORNEYS FOR APPELLEE.

IN THE SUPREME COURT,

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vs
CHARLES W. BECK, Appellee.

ON MOTION TO DISMISS AND AFFIRM.

REPLY TO APPELLANT'S BRIEF IN OPPOSITION.

The counsel for Appellant have filed a brief and argument in opposition to our motion that perhaps merits a short reply. There are submitted with it seven new affidavits as to value and an additional affidavit from Appellant Sturr.

Appellant's first contention is that in moving on the record we are bound by their affidavits already on file—claiming that they are a part of the record. This proposition needs no argument. Affidavits in the transcript are not a part of the record in the Supreme Court unless made so by an agreed statement of facts, bill of exceptions, special verdict, or demurrer to evidence. Baltimore & P. R. R. Co. vs. Sixth Presb. Ch. 91 U. S 27

Appellant next urges that this Court has jurisdiction under the

second section of the act, passed March 3, 1885,—that Appellant's effort to divert water was "an authority exercised under the United States." This honorable court has considered and passed upon the meaning of this language several times, and its construction is not favorable to Appellant's position. Snow vs. United States, 118 U. S. 346; Brown vs. Colorado, 106 U. S. 95; Smith et al vs. Adams, 130 U. S. 167.

And, feeling little faith in this contention, Appellant prints his affidavits, evidently supposing, as the burden was on him to establish jurisdiction, that as we had only served five, his coming back with seven besides his own ought to tip the scale.

But are these affidavits? They are not entitled to any cause or court, nor do they refer to any cause pending in any court. Rule 3 of this court, "considers the former practice of the courts of King's bench and of chancery in England, as affording outlines for the practice of this Court," subject to alterations from time to time as circumstances may render necessary. The rule of the common law is that an affidavit must be correctly entitled in the cause or matter in which it is made. 1 Bouv. Law Dict. 97; 1 Barb. Ch. 600; Hawley vs. Donnelly, 8 Paige 415.

If this Court, however, has come to accept the practice of the Code States, providing "that it shall not be necessary to entitle an affidavit in the action, but an affidavit made without a title or with a defective title, shall be as valid and effectual for every purpose as if it were duly entitled, if it intelligibly refer to the action or proceeding in which it is made," (Dakota Code Civ. Proc. Sec. 527.) yet we respectfully submit these affidavits are defective when gauged by this rule, as none of them refer to this Court or an action pending here.

But these affidavits are insufficient if judged on their merits. They do not contradict our affidavits, but rather corroborate their statements that False Bottom is a wet weather stream and carries no water through Appellee's farm. A few quotations will prove our assertion: No. 1, Henderson, says nothing on this point. No. 2. Odou, says, (Appellant's Brief in Opposition, pp. 7–8): "There is a larger flow of water down the main False Bottom creek until a short distance below the junction and above the head of Elm Tree ditch claimed by Daniel Sturr. * * Recent freshets in the past year or two have deposited considerable gravel and boulders at the

head of said ditch, which were left in a loose condition when its waters receded to their natural flow, and through which the water is now running, *and it appears dry on the surface of the gravel*, and the water comes to the surface again a short distance below, and flows onward down the stream *until it encounters another mass of gravel and boulders.*" No. 3, Perkins, is silent as to flow of water in False Bottom. No. 4, Widdows, does not describe the stream at Beck's place, but (p. 11) "below his (Sturr's) ranch *the water sinks or disappears in the gravel and comes to the surface again in places and flows on until it sinks again.*" No. 5, Fuller, admits that between the Knight ditch, two or three miles below Sturr's place, and a point *just above the head of Elm Tree ditch*, (p. 12) "*the bed of the stream in places and for considerable distances, is temporarily filled with loose gravel and boulders, through and beneath which the water of the creek flows on down the channel, coming to the surface now and then.*" No. 4, Renner, is very ingenious, (p. 14) finding 300 inches of water in the creek above the head of the Knight ditch, (how far above?) "and to all appearances there is about the same amount flowing in the creek a short distance (?) above the head of the Elm Tree ditch." As these points, if we may believe Fuller, are from two to three miles apart, Renner's observations become valueless. No. 5, Foglesong, does not describe the creek at and above Beck's, but admits (p. 15) "*the water sinks, so to speak, below Sturr's ranch and flows beneath or through a temporary lodgment of stones and gravel, for a short distance unseen,* and then appears again, flowing in the natural channel." A description of its flow on or above Beck's farm would have been more to the point. Sturr does not grapple with the subject himself, but (p. 19) adopts the admissions made by Odou already quoted from pp. 7–8.

We respectfully submit that these affidavits for Appellant are full of negative pregnants, remarkable for what they do not say, unfair, evasive and very unsatisfactory as evidence. In effect they admit the important facts alleged in the moving affidavits, that the flow of water in False Bottom creek is not continuous, and that no water flows in the irrigating season through Beck's farm and for some distance above and below. The suggestion of Sturr that by cleaning out the channel a current might be persuaded to flow through Beck's farm is purely speculative and not of any value as evidence. It might afford some amusement to Appellant to see Appellee expend several thousand dollars annually digging in the dry channel, but

whether it would result in finding any water, or if found bring it to the proper level to flow in the ditch, no one can tell.

Counsel finds fault with us because we stipulated to submit this appeal on printed arguments at this term, and now move to dismiss. Counsel well know how that stipulation was secured, and that they failed in the oral agreement which constituted its principal consideration. But as stipulations can not confer jurisdiction, our motion is entirely in order, that agreement to submit notwithstanding. We are not unwilling to present this appeal on its merits—we simply contend that it is frivolous to urge upon this Court a matter in dispute so trifling in value as this and falling so far below the limit of its jurisdiction.

But, as indicated in our motion, should this Court conclude it has jurisdiction, we urge the appeal is frivolous because of the plainness of the legal propositions involved and the evident justice of the decision of the trial court.

In the event the Court should deny the motion to dismiss and enter upon an examination of the record, we submit one suggestion accidentally omitted from our former brief. It is this: finding of fact No. 10 states that John Smith on February 2, 1882, recited in the written contract of that date made with the plaintiff Sturr, that the latter was the owner of the Elm Tree water right, which was the water right located by Sturr May 15, 1880. The finding is indefinite in not stating what kind of a contract this was; but neither as it stands nor by aid of the contract found in the agreed statement of facts and concerning a purely collateral matter, does it furnish any aid to Appellant in this controversy. Yet it was seriously contended in the Supreme Court of the Territory that that recital in a collateral contract (which the parties were enjoined by the local court from carrying into effect) created an estopped in Sturr's favor against Smith, which ran with the land against Beck! Counsel has abandoned the proposition in this Court; but as that finding is utterly immaterial except to give color to some such argument, we advert to it only to say that it does not contain any statement of facts creating an estopped or in the slightest degree prejudicial to the Appellee in this action. To say more would be to give the suggestion a dignity not now asked for it by counsel for Appellant.

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